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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

MITCHELL MILLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

MITCHELL MILLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-35a) is reported at 500 F.2d 751. The dissent from the denial of rehearing *en banc* (App. C, *infra*, pp. 38a-53a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 36a-37a) was entered on September 13, 1974. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 15, 1975 (App. C, *infra*, pp. 38a-53a). By an order

dated February 6, 1975, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 16, 1975 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a bank depositor has standing under the Fourth Amendment to challenge alleged irregularities in the issuance and scope of a subpoena *duces tecum* directed to a bank seeking production of its records of his account.

2. Whether (assuming a depositor has standing) a grand jury subpoena *duces tecum* is defective and violative of the Fourth Amendment (1) because issued by the district court clerk and completed by the United States Attorney's office on behalf of the grand jury, (2) because the grand jury was not sitting on the subpoena's return date, or (3) because the subpoena demanded production of all records relating to a named depositor for a period of approximately four months.

3. Whether, assuming a Fourth Amendment violation, a retrial was the proper remedy and, if so, whether exclusion of the evidence obtained by the defective grand jury subpoenas is required in the retrial.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their * * * papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

Rule 17(a), Federal Rules of Criminal Procedure, provides in pertinent part:

> A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena; signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. * * *

Rule 17(c), Federal Rules of Criminal Procedure, provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

1. On January 9, 1973, while fighting a fire at the Southeastern Metal Company warehouse in Kath-

leen, Georgia, officials of the County Sheriff's Department discovered a 7,500 gallon-capacity distillery, 175 gallons of non-tax-paid whiskey, and related paraphernalia (Tr. 32-44).[1]

The evidence showed that respondent had arranged for rental of the warehouse (Tr. 783-789) and had purchased a water pump (Tr. 240-247) and radio equipment found in the warehouse (Tr. 247-258). He had also arranged for the purchase of a truck (later found to contain a still cap and wheat shorts) (Tr. 572-586; 559-568; 568-572), paid for repairs of two vans used in the distillery operation (Tr. 327-340), and inquired about making large purchases of sugar (up to 1,000 tons) for a distillery operation (Tr. 298-327).

At trial,[2] respondent denied complicity in the distillery operation (Tr. 815-819) and claimed that he had provided these services at the request of a friend of a long-time associate (Tr. 782-790; 818-820).

Respondent and two others[3] were convicted on each of five counts of possessing an unregistered still,

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[1] "Tr." refers to the two-volume transcript of the trial, held May 7-14, 1973. "S. Tr." refers to the one-volume transcript of the suppression hearing, held April 18 and 23 and May 7, 1973.

[2] Respondent's first trial ended in a mistrial on May 1, 1973. A second trial commenced on May 7, 1973.

[3] Of the five persons indicted for conspiracy to defraud the United States of tax revenues by the manufacture and possession of distilled spirits, John Henry McDuffie and Susan McDuffie Weeks were tried and convicted with respondent. The charges against Terry Lee Smith were dismissed prior to

carrying on the business of distillers without giving bond and with intent to defraud the government of whiskey tax, possessing 175 gallons of whiskey upon which no taxes had been paid, and conspiracy to defraud the United States of tax revenues, in violation of 18 U.S.C. 371 and 26 U.S.C. 5601, *et seq.* Respondent was sentenced to concurrent terms of three years' imprisonment on each count.

2. Prior to the initial trial, respondent moved to suppress certain checks and other bank records that he claimed had been obtained by means of illegal grand jury subpoenas *duces tecum.* The district court denied the motion (S. Tr. 54).

The subpoenas had been issued in blank by the district court clerk and completed by the U. S. Attorney's office at the request of Treasury Department agents who were investigating the distillery operation. The subpoenas required the presidents of two Georgia banks[4] to appear in the United States District Court for the Middle District of Georgia at 9:00 a.m. on January 24, 1973, and to produce (App. A, *infra*, p. 11a)

> all records of accounts, *i.e.*, savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or

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trial, and Joseph Kenneth Brooks' motion for severance was granted.

[4] The subpoenas were served on Barry Jones, president of The Citizens and Southern National Bank, Warner Robins, Georgia, and Harold Peavey, president of the Bank of Byron, Byron, Georgia.

Mitch Miller, Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date [January 23, 1973].

The agents received microfilm records of respondent's checks and deposit slips, maintained by the banks in compliance with regulations issued under the Bank Secrecy Act of 1970, 84 Stat. 1114, 12 U.S.C. 1829b(d) (App. A, *infra*, p. 12a).[5] The agents then informed the bank presidents that it would not be necessary for them to appear in person before the grand jury. The grand jury met February 12, 1973, nineteen days after the return date on the subpoenas.[6]

Several copies of respondent's checks and deposit slips were introduced into evidence at trial (App. A, *infra*, pp. 11a-12a). They also provided in "one or two instances" investigative leads to other evidence introduced at trial (S. Tr. 46).

3. On appeal, a panel of the Court of Appeals for the Fifth Circuit held that the subpoenas *duces tecum* served on the two banks were faulty because they were issued by the United States Attorney's office rather than by the district court or the grand jury, were returnable on a date when no grand jury was in session, and required "broad disclosure" of respondent's financial records to the government (App. A, *infra*, p. 15a). The court further held that obtaining copies of respondent's bank checks by means of a faulty subpoena *duces tecum* constituted an unlawful invasion of respondent's "privacy" (App. A, *infra*, p. 11a), and that respondent therefore was "entitled to a new trial free from the taint of evidence improperly acquired" (App. A, *infra*, p. 16a).[7]

4. The government's Suggestion for Rehearing *En Banc* was denied (App. C, *infra*, pp. 38a-53a). Seven Circuit Judges dissented from the denial on the grounds that "the panel opinion departs radically from prior decisions denying to bank customers the standing to challenge subpoenas of bank records of their accounts" (App. C, *infra*, p. 39a) and that, even if depositor standing is assumed, "we do not agree that [the subpoenas] were defective. And even if the subpoenas were defective, no prejudice is shown such as to require their suppression" (App. C, *infra*, p. 48a).

REASONS FOR GRANTING THE WRIT

This case presents three important and related questions concerning grand jury subpoenas for bank records, about two of which the circuits are in sharp conflict: first, whether a bank depositor has standing

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[5] Mr. Jones testified that prior to the effective date of the regulations, his bank only made microfilm copies of selected transactions rather than of all checks and deposits (App. A, *infra*, pp. 12a-13a).

[6] The record does not reveal whether any of the bank records were presented to the grand jury.

[7] The court also affirmed Weeks' conviction and reversed McDuffie's conviction because of the introduction of evidence relating to a prior offense (App. A, *infra*, p. 35a). We do not seek review of the court of appeals' decision as it relates to McDuffie.

under the Fourth Amendment to challenge a subpoena of a bank's records pertaining to his account; second, assuming standing, whether a grand jury subpoena *duces tecum* is defective and violative of the Fourth Amendment when issued by the district court clerk and completed by the U.S. Attorney's office on behalf of the grand jury or when the grand jury is not in session on the subpoena's return date; and third, whether, assuming a Fourth Amendment violation, the appropriate remedy is exclusion of the evidence so obtained and retrial.

In recognizing a bank depositor's standing to challenge a grand jury subpoena for bank records, finding that a subpoena issued by the district court clerk and returnable on a date when the grand jury is not in session is defective and violative of the Fourth Amendment, and ordering a retrial "free from the taint of evidence improperly acquired" (App. A, *infra*, p. 16a), the court of appeals in the instant case adopted an unprecedented and unduly expansive notion of the content of the Fourth Amendment that will needlessly impede the investigative power of the grand jury, which "must be broad if its public responsibility is adequately to be discharged." *United States* v. *Calandra*, 414 U.S. 338, 344. The decision also creates a host of problems for federal prosecutors, who must adhere to formalistic and impractical requirements for issuing grand jury subpoenas *duces tecum* at possible risk of losing crucial evidence at trial, despite voluntary compliance with the subpoenas by those to whom they are directed.

1. The court of appeals assumed, without analysis, that bank records of a depositor's account are "private papers" of the depositor in which he has a Fourth Amendment interest (App. A, *infra*, p. 13a). But virtually every other circuit that has considered the issue (usually in the context of Internal Revenue Service summonses rather than grand jury subpoenas) has concluded, to the contrary, that a bank's records are not the private papers of its depositors, and that a depositor therefore has no standing to challenge the validity of a search or seizure of bank records of his account.[8]

Microfilm copies of depositors' accounts are bank property. "[T]he microfilm records [are] made and paid for by the Bank for its convenience and busi-

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[8] See *United States* v. *Continental Bank and Trust Co.*, C.A. 10, No. 73-1720, decided September 10, 1974; *Fifth Avenue Peace Parade Committee* v. *Gray*, 480 F.2d 326 (C.A. 2), certiorari denied, 415 U.S. 948; *Harris* v. *United States*, 413 F.2d 316, 318 (C.A. 9); *Galbraith* v. *United States*, 387 F.2d 617, 618-619 (C.A. 10); *O'Donnell* v. *Sullivan*, 364 F.2d 43, 44 (C.A. 1), certiorari denied, 385 U.S. 969; *Application of Cole*, 342 F.2d 5, 8 (C.A. 2), certiorari denied, 381 U.S. 950; *De Masters* v. *Arend*, 313 F.2d 79, 85 (C.A. 9), petition for certiorari dismissed, 375 U.S. 936; *Foster* v. *United States*, 265 F.2d 183, 187-188 (C.A. 2), certiorari denied, 360 U.S. 912; *United States* v. *Peoples Deposit Bank & Trust Co.*, 112 F. Supp. 720, 723-724 (E.D. Ky.), affirmed, 212 F.2d 86 (C.A. 6), certiorari denied, 348 U.S. 838; *In re Upham's Income Tax*, 18 F. Supp. 737, 738 (S.D. N.Y.); *Cooley* v. *Bergin*, 27 F.2d 930, 933 (D. Mass.); cf. *Pollard* v. *Roberts*, 283 F. Supp. 248, 258-259 (E.D. Ark.), affirmed *per curiam*, 393 U.S. 14. But see *Burrows* v. *Superior Court of San Bernardino County*, 118 Cal. Rptr. 166 (Sup. Ct.), 529 P.2d 590, petition for rehearing denied, March 12, 1975.

ness purposes. The Bank own[s] the microfilm." *Harris* v. *United States*, 413 F.2d 316, 318 (C.A. 9). Hence the records are, like corporate records of salary payments and other transactions with an employee-taxpayer sought by an IRS summons, "records in which the taxpayer [or depositor] has no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer [or depositor]." *Donaldson* v. *United States*, 400 U.S. 517, 523.[9] Since the Fourth Amend-

[9] As Mr. Justice Douglas observed in his concurrence in *Donaldson* (400 U.S. at 537), "it is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress."

In *Donaldson* this Court expressed specific approval of *O'Donnell* v. *Sullivan*, 364 F.2d 43, 44 (C.A. 1), certiorari denied, 385 U.S. 969, and *Application of Cole*, 342 F.2d 5, 7-8 (C.A. 2), certiorari denied, 381 U.S. 950, in which depositors' lack of proprietary interest in their bank account records was held to bar any protectable claim. Cases following *Donaldson* have uniformly denied depositors any right to intervene in summons enforcement proceedings for bank account records, on the ground that depositors have no proprietary interest in the records. See *United States* v. *National State Bank*, 454 F.2d 1249, 1251 n. 3, 1252 (C.A. 7); *Securities and Exchange Commission* v. *First Security Bank of Utah*, 447 F.2d 166, 168 (C.A. 10); *United States* v. *Bremicker*, 365 F. Supp. 701, 702-703 (D. Minn.); *United States* v. *Union Nat'l Bank*, 363 F. Supp. 629, 631-633 (W.D. Pa.); *United States* v. *Northwest Pa. Bank & Trust Co.*, 355 F. Supp. 607, 612, 614 (W.D. Pa.); *Smith* v. *Switzer*, 73-2 U.S. T.C., ¶ 9490 (W.D. Pa., May 30, 1973). See also *United States* v. *Luther*, 481 F.2d 429, 433 (C.A. 9) (taxpayer lacked proprietary interest in corporate records); *United States* v. *Weingarden*, 473 F.2d 454, 458,

ment protects a person "against whom the search was directed, as distinguished from one who claims prejudice only through the use of the evidence gathered as a consequence of a search or seizure directed at someone else," *Jones* v. *United States*, 362 U.S. 257, 261,[10] the only protectable Fourth Amendment interest at issue is that of the bank, not its depositor.

Nor does a bank depositor entertain any "reasonable expectation of freedom from governmental intrusion," *Mancusi* v. *DeForte*, 392 U.S. 364, 368; *Katz* v. *United States*, 389 U.S. 347, 352, with regard to his banking transactions. Names of payees, dates, and other memoranda appearing on negotiable instruments are not confidential communications. When a check is drawn, the instrument is cast forth upon the stream of commerce. A drawer understands that his payees may well endorse the instruments to third parties and that their endorsees may further endorse them. At the very least, the instruments "will be viewed by various employees at the bank where it is cashed and deposited, at the clearing house through which it must pass, and at his own bank to which it will eventually return." *Harris* v. *United States*, *supra*, 413 F.2d at 319-320. The bank itself is merely its depositor's debtor, hon-

n. 4 (C.A. 6) (taxpayer had no proprietary interest in attorney's records); *United States* v. *Widelski*, 452 F.2d 1, 4 (C.A. 6) (no proprietary interest or privilege in accountant's records).

[10] It is well established that the Fourth Amendment does not protect *jus tertii* interests. See *Alderman* v. *United States*, 394 U.S. 165, 171; *Wong Sun* v. *United States*, 371 U.S. 471, 492; *Goldstein* v. *United States*, 316 U.S. 114, 121.

oring instruments that the depositor-creditor sends into commerce. See Chorley, *Law of Banking* 13-22 (4th ed. 1960).

The Fourth Amendment, however, does not protect what "a person knowingly exposes to the public * * *." *Katz* v. *United States*, *supra*, 389 U.S. at 351. Nor is there any constitutional basis for "'constructing a wall of privacy against the grand jury which does not exist in casual contact with strangers.'" *United States* v. *Dionisio*, 410 U.S. 1, 14. While some may believe that it is nevertheless desirable as a matter of policy to adopt various measures limiting government access to bank records, this is a matter of legislative policy for determination by Congress, not a constitutional imperative.

The Bank Secrecy Act of 1970,[11] authorizing the Secretary of the Treasury to prescribe by regulation certain record-keeping and reporting requirements for banks, did not create any proprietary or privacy interest of depositors in their bank accounts where none existed before. Each bank continues to pay for copying and storing its records.[12] Indeed, with compulsory record-keeping, depositors have even less reason than before to expect that their transactions will

[11] 12 U.S.C. 1829b, 1730d, 1951-1959, and 31 U.S.C. 1051-1062, 1081-1083, 1101-1105, 1121-1122.

[12] In the instant case, both banks kept microfilm copies of customers' accounts in compliance with regulations issued under the Act. One of the banks had not maintained complete microfilm check records prior to the effective date of the regulations (App. A, *infra*, pp. 12a-13a).

be private. See *Couch* v. *United States*, 409 U.S. 322, 335; *United States* v. *White*, 401 U.S. 745, 752; cf. *Shapiro* v. *United States*, 335 U.S. 1. As this Court observed in *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 54, "in making the records required by the Secretary * * * [the bank] neither searches nor seizes records in which the depositor has a Fourth Amendment right."[13] In any event, it seems doubtful that legislation designed to insure the maintenance of records that "have a high degree of usefulness in criminal, tax, or regulatory investigations * * *," 12 U.S.C. 1829b(a)(2), should result in less governmental access to them than when the records were voluntarily maintained.[14]

[13] The Court's statement in *California Bankers* that government access to bank records under the Act would be "controlled by existing legal process" (416 U.S. at 52), upon which the court below relied, does not imply that a *depositor* has any protectable Fourth Amendment interest in the records. As the Court noted in the ensuing paragraph: "We decided long ago that an Internal Revenue summons directed to a third-party bank was not a violation of the Fourth Amendment rights of either the bank *or the person under investigation* by the taxing authorities" (id. at 53; emphasis supplied). By implication, therefore, the right to "existing legal process" can be asserted by the bank but not by the depositor.

[14] The court of appeals' expansive notion of Fourth Amendment standing may imply a right to challenge governmental access to other records kept by third parties pursuant to regulation or statute, such as records of telecommunications (see 47 U.S.C. 605(5); *United States* v. *Covello*, 410 F.2d 536, 541-542 (C.A. 2); *United States* v. *Russo*, 250 F. Supp. 55, 59 (E.D. Pa.)); sales of firearms (18 U.S.C. 922(a)(6) and (d)(1)); controlled drugs (21 U.S.C. 207, 209, 211); or federal securities (15 U.S.C. 77, *et seq.*).

2. Even assuming that a depositor has standing to challenge a subpoena of bank records of his account, the court of appeals has radically (and, we submit, erroneously) departed from tradition and practice in holding that a grand jury subpoena is defective and constitutes an unreasonable search and seizure when it is "issued not by the court or by the grand jury, but by the United States Attorney's office, for a date when no grand jury was in session, and which in effect compelled broad disclosure of * * * financial records to the government * * *" (App. A, *infra*, pp. 14a-15a).[15]

"[E]xisting legal process" controlling governmental access to bank records, to which this Court referred in *California Bankers*, *supra*, 416 U.S. at 52, is that of "subpoena or summons duly authorized and issued or as may otherwise be required by law," 31 U.S.C. 1121(b) (416 U.S. at 54, n. 24). The subpoenas *duces tecum* in the instant case—issued by the clerk of the court and completed by the U.S. Attorney's office on behalf of the grand jury, returnable 19 days before the grand jury was to meet, and calling for bank records of respondent's accounts during a four-month interval—was duly authorized and issued in accordance with Rules 17(a) and (c), Fed.

[15] It is not clear whether the court intended that any of the three noted "defects" would alone have sufficed to justify the result it reached, or whether its action depended upon the convergence of all three factors. In any event, grand jury practice in the Fifth Circuit will necessarily be radically transformed in all these respects if the decision stands.

R. Crim. P.,[16] and with accepted grand jury practice. See *United States* v. *Morton Salt Co.*, 216 F. Supp. 250 (D. Minn.), affirmed *per curiam*, 382 U.S. 44; *United States* v. *Culver*, 224 F. Supp. 419 (D. Md.); *In re Subpoenas Duces Tecum*, 248 Fed. 137 (E.D. Tenn.).

The court of appeals imposed needless and impractical formalities upon this process that will substantially impede the effective functioning of the grand jury. The grand jury depends upon the presentation of relevant evidence in an orderly manner—necessitating that the government attorney review the evidence prior to grand jury consideration, often before the grand jury is called into session. For example, the practice in the Middle District of Georgia, according to the district court, is for the U.S. Attorney "to prepare for the calling of the grand jury and to prepare matters to be presented to it" (S. Tr. 50). The court of appeals' requirement that the grand jury *itself* issue the subpoena and that it be returnable on a date when the grand jury is in session therefore would be unnecessarily time-consuming and (particularly in districts where the grand jury meets infrequently and its sessions are of brief duration) difficult to arrange. See *Martin* v. *Beto*, 397 F.2d 741, 745 (C.A. 5), certiorari denied, 394 U.S. 906;

[16] Rule 17(a) provides, in pertinent part:

> A subpoena shall be issued by the *clerk* under the seal of the court * * *, signed and sealed but otherwise *in blank* to a party requesting it * * *. [Emphasis supplied.]

United States v. *Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519, 521 (E.D. N.Y.).

The court of appeals' alternative requirement that the court approve each subpoena prior to issuance would be cumbersome and wasteful of judicial resources. A subpoena, unlike a search warrant, is merely a request to produce documents. It does not constitute a governmental intrusion upon possession of property necessitating prior judicial scrutiny, since nothing is thereby taken from the subpoenaed party,[17] who may in any event obtain an order to quash the subpoena if production would be "unreasonable or oppressive" (Rule 17(c), Fed. R. Crim. P.; see also *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op. 13), or contest the subpoena in a show cause hearing. *United States* v. *Ryan*, 402 U.S. 530, 533; *Cobbledick* v. *United States*, 309 U.S. 323.

To be sure, the power to subpoena bank records without the necessity of obtaining prior judicial approval of each subpoena may on occasion be abused. But as this Court recently observed with regard to a similar potential for abuse in the issuance of Internal Revenue Service summonses, " '[t]hat the power may be abused is no ground for denying its existence. It is a limited power, and should be kept within its proper bounds; and, when these are exceeded, a jurisdictional question is presented which is cog-

[17] See *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 208-209; *United States* v. *Birrell*, 242 F. Supp. 191, 204 (S.D. N.Y.); *Application of Kelly*, 19 F.R.D. 269 (S.D. N.Y.).

nizable in the courts.' " *United States* v. *Bisceglia*, No. 73-1245, decided February 19, 1975, slip op. 10 (citations omitted).

Here, there is no reason to infer that the prosecuting attorney abused the grand jury subpoena process. The subpoenaed records clearly were sought in connection with a specific investigation, which in fact resulted in an indictment by the grand jury. The subpoenas designated the records with reasonable particularity;[18] they identified respondent, his home and business addresses, and the precise dates at issue (October 1, 1972-January 23, 1973).[19] Indeed, the subpoenas were far more specific than an Internal Revenue Service "John Doe" summons to discover the identity of a person who has had bank transactions suggesting possible liability for unpaid taxes. *United States* v. *Bisceglia*, *supra*. The court of appeals did not deny that, at the time the subpoenas were issued, there was substantial basis for the belief both that respondent was involved in the offense under investigation and that these bank records might contain important evidence of the illegal activities.

[18] See, *e.g.*, *United States* v. *Olin Mathieson Chemical Corporation*, 36 F.R.D. 18 (S.D. N.Y.); *In re Subpoena Duces Tecum, Etc.*, 203 F. Supp. 575, 578 (S.D. N.Y.); *People* v. *Dorr*, 47 Ill. 2d 458, 265 N.E. 2d 601; cf. *Hale* v. *Henkel*, 201 U.S. 43.

[19] The subpoenas, presented on January 23, 1973, requested records of respondent's accounts "from October 1, 1972, through the present date" (App. A, *infra*, p. 11a).

Moreover, a grand jury may reasonably subpoena evidence "merely on suspicion that the law is being violated or even just because [the grand jury] wants assurance that it is not," *United States* v. *Bisceglia*, *supra*, slip op. at 7, relying upon *United States* v. *Powell*, 379 U.S. 48 and *United States* v. *Morton Salt Co.*, 338 U.S. 632. Indeed, if the grand jury investigation is to be meaningful, "[s]ome exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury." *Schwimmer* v. *United States*, 232 F.2d 855, 862-863 (C.A. 8).[20]

3. Even if the subpoenas, as issued, were defective and violative of respondent's Fourth Amendment rights, it does not follow that the proper remedy is "a new trial free from the taint of evidence improperly acquired" (App. A, *infra*, p. 16a). The exclusionary rule is generally "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348. Exclusion of this evidence, however, would serve no deterrent purpose and would merely waste judicial resources, since the excluded bank records presumably may be reacquired pursuant to validly issued trial subpoenas, and evidence derived therefrom reintroduced under the "independent source" doctrine of *Wong Sun* v. *United States*, 371

[20] As this Court stated in *Branzburg* v. *Hayes*, 408 U.S. 665, 701: "A grand jury investigation 'is not fully carried out until every available clue has been run down * * * to find if a crime has been committed'" (citations omitted).

U.S. 471, 488. Cf. *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385, 392.[21]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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MARCH 1975.

[21] The court of appeals did not address the question whether this evidence, even though held to have been improperly obtained in connection with the prior trial, could now be lawfully obtained through regular process acceptable in form to the court of appeals. If there is to be a new trial, considerations of judicial economy would appear to call for some consideration of this question at the present time.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-2405

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MITCHELL MILLER, SUSAN MCDUFFIE WEEKS, and JOHN HENRY MCDUFFIE, DEFENDANTS-APPELLANTS

Sept. 13, 1974

Three defendants were convicted before the United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., J., of conspiracy to defraud the United States of tax revenues by the manufacture and possession of distilled spirits. Additionally, two of the three defendants were also convicted of possession of an unregistered still, carrying on the business of distillers without giving bond with intent to defraud the United States of the whiskey tax and possession of non-tax-paid whiskey. Appeals were taken. The Court of Appeals, Goldberg, Circuit Judge, held that copies of telephone bills were admissible under the Business Records Act; that denial of two defendants' motions to discover results of fingerprint and handwriting analyses conducted by government experts was not prejudicial; that obtaining copies of one defendant's bank checks by means of faulty subpoenas duces tecum constituted an un-

lawful invasion of his privacy and evidence so obtained should have been suppressed; that evidence of another defendant's prior conviction of possession of non-tax-paid whiskey was inadmissible; and that evidence sustained conviction of third defendant.

Affirmed in part, reversed in part and remanded.

Appeal from the United States District Court for the Middle District of Georgia.

Before GEWIN, GOLDBERG and CLARK, Circuit Judges.

GOLDBERG, Circuit Judge:

On January 9, 1973, a fire broke out at the Southeastern Metal Company warehouse in Kathleen, Georgia. When officials of the Houston County Sheriff's Department and volunteer fire department arrived to fight the blaze, they discovered in the building a 7500 gallon-capacity distillery, some 175 gallons of non-tax-paid whiskey, and related paraphernalia. With this discovery the lush dreams of bourbon living that the still owners must have harbored were suddenly scotched.

Although no arrests were made at that time, five persons—Mitchell Miller, John Henry McDuffie, Susan McDuffie Weeks, Joseph Kenneth Brooks, and Terry Lee Smith—were subsequently charged with conspiracy to defraud the United States of tax revenues by the manufacture and possession of distilled spirits. In addition, all of the alleged co-conspirators

except Weeks were charged with substantive counts of possession of an unregistered still, carrying on the business of distillers without giving bond and with intent to defraud the United States of the whiskey tax, and possession of 175 gallons of non-tax-paid whiskey. Prior to trial the charges against Smith were dismissed, and the court granted Brooks' motion for severance.[1]

The trial of defendants Miller, McDuffie, and Weeks began on April 23, 1973, and ended in a mistrial on May 1, 1973. A second trial commenced on May 7, 1973, resulting in conviction of all three defendants on all charges. Miller and McDuffie were sentenced to three years imprisonment; Weeks received five years probation.

On this appeal defendants urge ten separate grounds for reversing their convictions. Only one issue is common to all three defendants, and one argument is made by both McDuffie and Weeks; in addition, Miller argues five alleged trial court errors; McDuffie, two; and Weeks, one.

I. ISSUES RAISED BY MORE THAN ONE DEFENDANT

A. *The Business Records Act.* The one contention shared by all three defendants is that the district

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[1] Brooks subsequently entered a plea of guilty to one count of the indictment and was sentenced to 5 years probation with supervision. The remaining counts against Brooks were dismissed.

court erred by admitting into evidence copies of customers' phone bills without proper foundation under the Business Records Act, 28 U.S.C. § 1732,[2] and

[2] § 1732. *Record made in regular course of business; photographic copies*

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an

without the necessary showing of trustworthiness. The thrust of defendants' objection is that the items should not have been admitted because: 1) they were not prepared under the supervision of the witnesses who testified as to their authenticity; and 2) they were copies of bills made up monthly from records and not contemporaneously with the transaction, and thus did not constitute the best evidence of the matters reflected thereon.

[1] In view of the purpose and plain meaning of section 1732, we find defendants' arguments unpersuasive. The statute explicitly establishes the admissibility of "any writing or record . . . if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record . . . ." In Sabatino v. Curtiss National Bank of Miami Springs, 5 Cir. 1969, 415 F.2d 632, this Court reviewed cases in which items offered under the Business Records Act had been excluded. We concluded that the statute's primary purpose was "to provide a check on trustworthiness," and that records should be admitted if three conditions are met:

(1) the records must be kept pursuant to some routine *procedure* designed to assure their ac-

enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

> curacy, (2) they must be created for *motives* that would tend to assure accuracy (preparation for litigation, for example, is not such a motive), and (3) they must not themselves be mere cumulations of hearsay or uninformed opinion.

415 F.2d at 637. The type of telephone toll records introduced in the trial below clearly meet section 1732 standards. *See* United States v. Mirenda, 9 Cir. 1971, 443 F.2d 1351, 1357; *cf.* United States v. Covello, 2 Cir. 1969, 410 F.2d 536, 542, cert. denied, 396 U.S. 879, 90 S.Ct. 150, 24 L.Ed.2d 136.

[2, 3] We have often noted that the trial court has a broad zone of discretion in determining the admissibility of documents such as business records, and that the court's rulings should be disturbed only when that discretion has been abused. *E.g.*, United States v. Middlebrooks, 5 Cir. 1970, 431 F.2d 299, 302, cert. denied, 1971, 400 U.S. 1009, 91 S.Ct. 569, 27 L.Ed.2d 622. Defendants contend that the telephone records were rendered inadmissible because the witnesses whose testimony laid the foundation for receipt of these items were not the persons who kept the records. This contention is not supported by the statute and is directly contradicted by the weight of judicial authority. "[T]he person who actually keeps the books and records and makes the entries need not testify if a person does testify who is in a position to attest to the authenticity of the records." United States v. Dawson, 2 Cir. 1968, 400 F.2d 194, 199. Indeed, section 1732 was adopted in part to eliminate the requirement that the entrant

appear to authenticate the record. United States v. Anderson, 8 Cir. 1971, 447 F.2d 833, 839; United States v. Re, 2 Cir. 1964, 336 F.2d 306, 314, cert. denied, 379 U.S. 904, 85 S.Ct. 188, 13 L.Ed.2d 177. Three telephone company employees testified that the government exhibits in question were copies of customer bills and company records, were kept in the ordinary course of business, and were made at or near the time of the transactions reflected on them. That testimony was clearly sufficient to justify admitting the records.

[4] Defendants' argument that these records were not the best evidence is similarly without merit. The best evidence rule has repeatedly been held inapplicable to records admitted under the Business Records Act. United States v. Anderson, *supra*; United States v. Vandersee, 3 Cir. 1960, 279 F.2d 176, 180; United States v. Kimmel, 2 Cir. 1960, 274 F.2d 54, 57.

[5] The telephone records in question were clearly admissible under the three prongs of the *Sabatino* test. First, in each instance they were records kept in the regular course of business on a routine basis designed to assure their accuracy. Second, the purpose for keeping the records was not to prepare for litigation but to assure accurate billing of customers. Third, they were not mere cumulations of hearsay or informal opinion, but they were made at or near the time of the transactions reflected in them. We therefore hold that the district court did not abuse

its discretion in admitting the telephone toll records into evidence.

B. *Discovery.* Weeks and McDuffie also claim that the trial court improperly denied their motions under Rule 16(a), Federal Rules of Criminal Procedure, to discover the results of fingerprint and handwriting analyses conducted by government experts. Defendants argue that Rule 16(a) should be broadly construed and that the district court should be given only limited discretion to deny a proper motion for discovery. Professor Wright has found support for this view by comparing Rule 16(a) with Rule 16(b):

> Since a specified showing [of materiality] is required under (b), but not under (a), the plain inference is that no showing is required for discovery under (a), and that while that subdivision is cast in discretionary terms it gives the defendant "virtually an absolute right" to discovery of the materials there listed. The nature of the materials covered by subdivision (a), and the strong interest of the defendant in having access to them, justifies such discovery as a matter of right.

1 C. Wright, Federal Practice and Procedure, Criminal § 253, pp. 500-01.

[6] Although this Court has approved a standard similar to that suggested by Professor Wright, *see* United States v. White, 5 Cir. 1971, 450 F.2d 264, 267-268, we have also adhered to the rule that "an error in administering the discovery rules is not reversible absent a showing that the error was prejudicial to the substantial rights of the defendant." United States v. Saitta, 5 Cir. 1971, 443 F.2d 830, 831; Fed.R.Crim.P., Rule 52(a). We are satisfied that, on the peculiar facts of the present case, no prejudice to defendants could have resulted from the denial of their motion for discovery.

In the first place, as partial grounds for denial of the motion, the trial judge acknowledged that in open court the government had offered defendants access to the handwriting and fingerprint evidence. The record gives no indication that the government withdrew its offer or declined to make the information available. Moreover, all of the evidence in question was introduced at the first trial; defendants have brought this appeal from the second trial. Thus, the first trial itself provided disclosure not only of the contents of the reports, but also of the substance of the experts' testimony. As a result of this combination of circumstances, any error in denying motions for discovery was rendered harmless by the time of the second trial.

II. MITCHELL MILLER

In addition to his Business Records Act claim, defendant Miller makes five assignments of error on this appeal: (1) the trial court erred by admitting microfilm copies of Miller's bank checks obtained by means of an illegal grand jury subpoena duces tecum; (2) the trial court erred by overruling, on the ground of lack of standing, Miller's motion to suppress evi-

dence from a Pepsico rental truck; (3) the trial court abused its discretion by denying Miller's motion for continuance; (4) the trial court abused its discretion by denying Miller's motion for severance; (5) the trial court erred in denying Miller's motion for directed verdict of acquittal as to Counts 2, 3 and 5.

A. *The "Grand Jury" Subpoena.* Miller's objection to the introduction of microfilm copies of his bank checks rests on two separate but related contentions. First, relying primarily on the three-judge district court decision in Stark v. Connally, N.D.Cal. 1972, 347 F.Supp. 1242, Miller asserts that provisions of the Bank Secrecy Act of 1970 requiring banks to microfilm all checks passing through them constitute a violation of depositors' Fourth Amendment rights to be free from unreasonable searches and seizures. Second, Miller claims that the subpoenas used to obtain the microfilm copies here were illegal because they were issued by the United States Attorney rather than by the court, because no return was made upon the subpoenas to the court, and because the subpoenas were issued for a date when the grand jury was not in session.

[7, 8] Miller's argument that the Bank Secrecy Act is unconstitutional is now foreclosed by the Supreme Court's recent decision in California Bankers Ass'n v. Shultz, 1974, —— U.S. ——, 94 S.Ct. 1494, 39 L.Ed.2d 812, reversing in part Stark v. Connally, *supra*. However, in view of the long recognized inclusion of private papers and records within the scope of Fourth Amendment protections, reinforced

by the Court's reasoning in *California Bankers*, we hold that obtaining copies of Miller's bank checks by means of a faulty subpoena duces tecum constituted an unlawful invasion of Miller's privacy, and that any evidence so obtained should have been suppressed.

On January 23, 1973, agents of the government's Alcohol, Tobacco & Firearms (ATF) Unit presented to Barry Jones, President of Citizens and Southern National Bank, Warner Robins, Georgia, and to Harold Peavey, President of the Bank of Byron, Byron, Georgia, purported grand jury subpoenas duces tecum requiring them to appear in the United States District Court for the Middle District of Georgia at 9:00 a.m., on January 24, 1973. The subpoenas commanded the recipients to produce

> all records of accounts, *i. e.*, savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or Mitch Miller, Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date.

Defendant Miller was not advised that these subpoenas had been served. After the banks supplied the requested documents to the ATF agents, Jones and Peavey were advised that they would not need to appear at the January 24 grand jury session. In fact, the grand jury did not meet on January 24; their next meeting was on February 12, nearly three weeks later.

At the suppression hearing ATF Agent Powell testified that he viewed microfilm copies of all checks

on Miller's account at the Bank of Byron and took copies of one deposit slip and one or two checks. At the Citizens and Southern Bank Agent Powell received copies of all of Miller's checks for the period covered by the subpoena except for two that would not print. The prosecution introduced several of these copies into evidence at trial, using them to help establish at least three of the overt acts charged against Miller in furtherance of the conspiracy.

Both Jones and Peavey entered stipulated testimony that their banks kept microfilm copies of customers' accounts and of personal checks paid through those accounts "in compliance with Treasury and Banking Regulations issued under the Bank Secrecy Act." [3] The Citizens and Southern Bank had not

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[3] Record, Vol. I, pp. 73, 76. The pertinent section of the Bank Secrecy Act, 12 U.S.C. § 1829b(d), provides:

> (d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—
>
> (1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and
>
> (2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

The regulations promulgated pursuant to section 1829b(d) essentially require that each bank retain either the original or a copy of each check, draft, or money order in excess of $100 drawn on the bank or issued and payable by it. 31 C.F.R. § 103.34(b)(3) (1973). Such records must be retained for a period of five years. 31 C.F.R. § 103.36(c) (1973).

maintained complete microfilm check records prior to the effective date of the regulations (Record, Vol. II, pp. 35-36); the trial transcript does not reflect whether the Bank of Byron had previously kept such records.

As we have noted, the Supreme Court's decision in California Bankers Ass'n v. Shultz, *supra*, disposes of Miller's challenge to the constitutionality of the recordkeeping requirements of the Bank Secrecy Act. That decision, however, did not place the judicial stamp of approval upon every prosecutorial tactic for obtaining records compiled under the requirements of the Act.

[9] The Supreme Court determined almost 90 years ago that "a compulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the fourth amendment . . . ." Boyd v. United States, 1886, 116 U.S. 616, 622, 6 S.Ct. 524, 528, 29 L.Ed. 746. The venerable *Boyd* doctrine still retains its vitality; [4] the government may not cavalierly circumvent *Boyd's* precious protection by first requiring a third party bank to copy all of its depositors' personal checks and then, with an improper invocation of legal process, calling upon the bank to allow inspection and reproduction of those copies. In upholding the Bank Secrecy Act the divided *California Bankers* Court determined that

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[4] *Boyd* was recently cited as the "fountainhead case" in the establishment of privacy as a fundamental value protected by the Bill of Rights. Roe v. Wade, 1973, 410 U.S. 113, 209 n. 2, 93 S.Ct. 705, 35 L.Ed.2d 147 (Douglas, J. concurring).

the government could take the first of those steps without exceeding constitutional limits. The Court, however, did not choose to abandon 90 years of precedent by proclaiming open season on personal bank records. Indeed, in rejecting the Fourth Amendment claims of bank depositor plaintiffs, the *California Bankers* majority, in an opinion by Justice Rehnquist, relied heavily upon the proposition that depositors have adequate legal protection from improper government access to their records:

> We see nothing in the Act which violates the Fourth Amendment rights of any of these plaintiffs. Neither the provisions of Title I [Recordkeeping Requirements] nor the implementing regulations require that any information contained in the records be disclosed to the Government; both the legislative history and the regulations make specific reference to the fact that access to the records is to be controlled by existing legal process.

—— U.S. at ——, 94 S.Ct. at 1513, 39 L.Ed.2d at 835.[5] Surely a purported grand jury subpoena, is-

[5] *See* 31 C.F.R. § 103.51 (1973). The Report of the House Committee on Banking and Currency states:

> It should be borne in mind that records to be maintained pursuant to the regulations of the Secretary of the Treasury will not be made automatically available for law enforcement purposes. They can only be obtained through existing legal process.

H.Rep. No. 91-975, 91st Cong., 2d Sess., 5 (1970); 2 U.S. Code Cong. & Admin. News 4395 (1970). *See also*, S.Rep. No. 91-1139, 91st Cong., 2d Sess., 10 (1970).

sued not by the court or by the grand jury, but by the United States Attorney's office, for a date when no grand jury was in session, and which in effect compelled broad disclosure of Miller's financial records to the government, does not constitute sufficient "legal process" within the meaning of the majority opinion.[6]

[6] A separate opinion filed by two members of the six Justice majority in the *California Bankers* case provides additional support for this proposition. Justice Powell, for himself and Justice Blackmun, joined the majority opinion, but entered a separate concurring opinion to note his concern over the scope of the reporting provisions of the Act, which confer broad authority on the Secretary of the Treasury to require financial institutions to file reports of domestic monetary transactions. Limiting his approval of these requirements to the boundaries of the current implementing regulations—transactions in currency of more than $10,000, 31 C.F.R. § 103.22 (1973)—Justice Powell warned that significant extension of the government's power to compel disclosure of financial transactions would pose substantial constitutional difficulties:

> Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate.

—— U.S. at ——, 94 S.Ct. at 1526, 39 L.Ed.2d at 850-851 (Powell, J., concurring). A governmental order to disclose copies of a bank depositor's checks is at least as obnoxious to constitutional principles when exercised, as here, without

[10] It is no answer to argue, as does the government on this appeal, that bank officials cooperated fully and without objection; for he whose rights are threatened by the improper disclosure here was a bank depositor, not a bank official, and depositors as well as banks must be accorded the protection of "legal process." *See* Donaldson v. United States, 1971, 400 U.S. 517, 537, 91 S.Ct. 534, 27 L.Ed.2d 580 (Douglas, J., concurring); United States v. Kordel, 1970, 397 U.S. 1, 7, 90 S.Ct. 763, 25 L.Ed.2d 1. The trial court should not have admitted into evidence copies of Miller's bank checks or any evidence resulting from investigative leads provided by information from those checks. Without attempting to chart any future course to be followed to validly obtain such evidence, we now hold that defendant Miller is entitled to a new trial free from the taint of evidence improperly acquired.

B. *Standing to Challenge the Search of the Pepsico Van.* Defendant Miller raises one other very troublesome issue on this appeal. He argues that the trial court improperly overruled, on the basis of lack of standing, his motion to suppress distillery apparatus and raw material seized from a Pepsico rental truck. On the basis of information supplied by an informant that a "blue van type truck . . . would be picking up some kind of illegal stuff to manufacture liquor," Deputy Sheriff Burnham stopped a Pepsico truck,

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sanction in statute or regulation as it would be under authority of an extended legislative scheme.

which was occupied by Joseph Brooks and Terry Lee Smith.[7] When Brooks and Smith were unable to produce a key to the back of the van, Deputy Burnham took them and the truck to the county jail, obtained a search warrant, and searched the truck; the search revealed cylinders of bottled gas, a shotgun condenser, two 100 pound bags of wheat shorts, a cap, and 150 five gallon plastic jugs. Defendants Miller, Weeks, and McDuffie all filed motions to suppress the evidence obtained from the Pepsico truck.[8] On April 19, 1973, the district court granted those motions, declaring that:

> the affidavit in question and the resulting search warrant does [sic] not meet the minimum requirements of the laws of the State of Georgia, Georgia Law 1966, pp. 567-568, as informally codified in Ga.Code Ann. 27-303, and the constitutional requirements as interpreted by the Supreme Court of the United States in the cases of Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509; Spinelli v. United States, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584, and United States v. Harris, 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075, in that said affidavit, among other things, does not contain information in any way sufficient to demonstrate that the Justice of the Peace who issued the search warrant in question was afforded information by which the Justice of the Peace had the oppor-

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[7] *See* footnote 1 *supra* & accompanying text.

[8] The record is unclear as to whether Brooks and Smith filed motions to suppress.

> tunity to independently judge the sufficiency of the information furnished by the informer to the Deputy Sheriff. (Record, Vol. I, pp. 78-79).

On the morning the first trial began, the government moved the court to reconsider its order granting defendants' motions to suppress, claiming that defendants Miller, McDuffie, and Weeks lacked "the requisite standing to challenge the illegal search" because they "were neither in the vehicle nor owners of, nor claimants of an interest in the vehicle or the object seized therefrom." (Record, Vol. I, pp. 91, 93-94). The court granted the government's motion and permitted the evidence to be introduced at trial.

In his motion to suppress, defendant Miller stated that he "believes that the Government will attempt to prove either the purchase of or ownership by him of the above described vehicle." (Record, Vol. I, p. 34). The conspiracy count of the original indictment, in Overt Act #9, charged that Miller had purchased the Pepsico van in question on November 22, 1972, from Dixie Truck and Parts Company and that Miller had indicated that the purchase was for Trans Aero Corporation. In order to defeat Miller's standing to challenge the search of the van, the government agreed to have Overt Act #9 deleted from the indictment. At the hearing on the government's motion to reconsider the suppression order, the prosecution took the position that the corporation, not Miller, owned the truck. By arrangement of its evidence at the second trial, however, the government sought to show that Miller exercised control over the

use of the van and that the purchase in the name of the corporation was merely a straw purchase by Miller. Other than his allegation that "the Government will attempt to prove . . . ownership," Miller made no claim, either before or during the trial, that he owned the van.

The facts of this case pose the question left unanswered by Brown v. United States, 1973, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208, the Supreme Court's most recent ruling on the requirements for standing to challenge a search, and by *Brown's* gloss on the Court's earlier decision in Jones v. United States, 1960, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697. In *Brown* the Court held that, at least when prosecutorial self-contradiction is not a factor,

> there is no standing to contest a search and seizure where . . . the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

411 U.S. at 229, 93 S.Ct. at 1569. Miller alleged, not that he had a proprietary or possessory interest in the premises, but that the government would attempt to prove such an interest; and Miller cannot claim standing on the basis of either standard (a) or standard (c). Therefore, absent the element of prosecutorial self-contradiction in the present case,

Miller would not be able to challenge the search and seizure of the van.

The Court's earlier *Jones* decision, however, clearly deemed that missing element to be a critical factor:

> [T]o hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. . . . The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government.

362 U.S. at 263-264, 80 S.Ct. at 732.[9]

The self-contradictory prosecutorial conduct in the present case is within the ambit of the reasoning, if not the strict holding, in *Jones*. The Court in *Brown*, however, viewing *Jones* through the prism of the intervening case of Simmons v. United States,[10] left

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[9] Although in the case *sub judice* ownership of the truck was not an essential element of the offense charged and Miller's proprietary or possessory interest would not have been lawless *per se*, the government obviously considered Miller's ownership and control over the van to be quite important in establishing his connection with the conspiracy. The distinction clearly does not render the government's trial and pre-trial positions any less contradictory.

[10] 1968, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247. In *Simmons* the Court held that, when a defendant makes statements in a pretrial hearing to establish standing to challenge a search, that testimony may not be used against the defendant at trial. According to the *Brown* Court, *Simmons* removed the most dangerous aspects of the self-incrimination element from the *Jones* equation.

open the question of whether standing is conferred as a matter of course, even absent any of the three stated indicia, when prosecutorial self-contradiction is demonstrated:

> [W]e do not decide that this vice of prosecutorial self-contradiction warrants the continued survival of *Jones*' "automatic" standing now that our decision in *Simmons* has removed the danger of coerced self-incrimination. We simply see no reason to afford such "automatic" standing where, as here, [there was no] risk to a defendant of either self-incrimination or prosecutorial self-contradiction.

Brown v. United States, *supra*, 411 U.S. at 229, 93 S.Ct. at 1569.

Given the posture of the case *sub judice*, we also may defer a decision as to whether the government's duplicitous tactics were sufficient to confer standing upon defendant Miller. Miller is entitled to a new trial because of the trial court's error in admitting copies of his bank checks into evidence. *See* Part II A, *supra*. At his new trial Miller may choose to assert his proprietary interest at the suppression hearing. He would thereby establish, under standard (b) of the *Brown* test, his standing to challenge the search of the van, and would obviate any need for

this Court to decide what follows *Jones* and *Brown* in this troublesome area of criminal procedure.

[11] C. *Continuance, Severance, and Insufficient Evidence.* After careful consideration of the record on appeal and the arguments of the parties, we find no merit in Miller's remaining assignments of error. The trial court did not abuse its discretion by denying Miller's motions for continuance [11] and for severance. *See, e. g.*, Ungar v. Sarafite, 1964, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (continuance); McKinney v. Wainwright, 5 Cir. 1974, 488 F.2d 28, cert. denied, —— U.S. ——, 94 S.Ct. 1998, 40 L.Ed. 2d 562 (continuance); Leach v. United States, 5 Cir. 1968, 402 F.2d 268, cert. denied, 1969, 393 U.S. 1082, 89 S.Ct. 864, 21 L.Ed.2d 775 (severance). Finally, we conclude that there was sufficient evidence for the district judge to submit to the jury the questions of defendant Miller's guilt or innocence of possessing an unregistered distillery (Count 2), carrying on the business of a distiller without giving bond (Count 3), and possessing non-tax-paid whiskey (Count 5).

[11] Miller's motion for continuance prior to the second trial was based on his assertion that pretrial publicity and erroneous news reports about testimony and evidence at the first trial would have prevented him from receiving a fair trial before an impartial jury at that time. The second trial was scheduled to begin only six days after the first had ended in a mistrial. Our independent review of the record has revealed neither inherently prejudicial publicity, Sheppard v. Maxwell, 1966, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, nor actual prejudice on the jury panel, Hale v. United States, 5 Cir. 1970, 435 F.2d 737.

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 1961, 366 U.S. 717, 722-723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751; Hale v. United States, *supra*, 435 F.2d at 745-746.

III. JOHN HENRY McDUFFIE

[12, 13] In addition to his Business Records Act claim [12] and his discovery claim,[13] defendant John Henry McDuffie makes two assignments of error on this appeal: 1) that the trial court erred by refusing to allow McDuffie to introduce evidence as to the existence of an illicit distillery not connected with other evidence in the case; and 2) that the trial court erred by admitting evidence of McDuffie's prior indictment and guilty plea for possession of non-tax-paid whiskey. We find no merit in the first claim. We conclude, however, that defendant McDuffie must be granted a new trial because the introduction of

[12] *See* Part I A, *supra*.

[13] *See* Part I B, *supra*.

evidence of his prior offense violated the "universal rule . . . that evidence of the commission of a wholly separate and independent crime is not admissible as a part of the case against the defendant." 2 C. Wright, Federal Practice and Procedure, Criminal § 410, at 123.

This Court has, of course, recognized a number of exceptions to the "universal rule." In the present case the government urges that McDuffie's prior conviction for possession of non-tax-paid whiskey was properly admitted under the "intent" exception. The Fifth Circuit has indeed held that, in certain cases,

> evidence of other offenses by the accused is admissible to show his criminal intent as to the offense charged, where the other offenses are similar to and not too remote from that charged, and where intent is in issue as an element of the offense charged.

Weiss v. United States, 5 Cir. 1941, 122 F.2d 675, 682, cert. denied, 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550. The government's rationale, and the one apparently adopted by the court below, is that because evidence of other crimes may be introduced to show intent, because intent is an element in at least two counts of the indictment against McDuffie, and because both the prior crime and the presently alleged offenses involve moonshine whiskey, the earlier conviction must be admissible. (*See* Record, Vol. III, pp. 286-298—in chambers discussion among court and counsel on government's offer of prior crime evidence).

That analysis, however, fails to take into account the constancy with which this Court has adhered to the view that the "universal rule" against admitting evidence of other crimes is a just and wise rule, and that the exceptions to that principle, each of which has been carved out to serve a limited prosecutorial and judicial purpose, should not be permitted to swallow the rule.[14] Pursuant to that view we have adopted a balancing approach, most recently articulated in United States v. Goodwin, 5 Cir. 1974, 492 F.2d 1141, 1150:

> Assuming, of course, that the evidence of other crimes is clear and convincing, we must balance the actual need for that evidence in view of the contested issues and the other evidence available to the prosecution, and the strength of the evidence in proving the issue, against the danger that the jury will be inflamed by the evidence to decide that because the accused was the perpetrator of the other crimes, he probably committed the crime for which he is on trial as well.

See also, United States v. Lawrance, 5 Cir. 1973, 480 F.2d 688, 691-692 n. 6; United States v. Johnson, 5

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[14] As Dean McCormick warned,

> [i]f the judges, trial and appellate, content themselves with merely determining whether the particular evidence of other crimes does or does not fit in one of the approved classes, they may lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification.

C. McCormick, Evidence § 190, at 453 (2d ed. 1954).

Cir. 1972, 453 F.2d 1195, 1199; United States v. Boyd, 5 Cir. 1971, 446 F.2d 1267, 1270-1271. The trial record reveals that virtually no consideration was given to any of the crucial elements in the balancing process—the government's actual need for the evidence, the probative value of the evidence, or the potential prejudice to the accused.

Our own examination of the relevant factors indicates that the evidence in question ought to have been excluded. The government argues that intent to defraud the United States of the tax on distilled spirits is the element of Count 1 (conspiracy) and Count 4 (carrying on the business of distiller of spiritous liquors) that justifies admitting McDuffie's prior conviction. We cannot agree. As to establishing that type of intent, we see no probative value whatsoever in defendant's earlier conviction of possession of non-tax-paid whiskey, a crime which requires no such intent. *See* Hamilton v. United States, 5 Cir. 1969, 409 F.2d 928, 930; McClain v. United States, 5 Cir. 1955, 224 F.2d 522, 525. The government urges vigorously that possession is one of the items in the count of conspiracy to defraud "by manufacturing, distilling, possessing, transporting, removing, depositing and concealing distilled spirits . . ."; but the trial record clearly demonstrates that the government's proof against McDuffie went primarily to conspiracy to manufacture and distill rather than conspiracy to possess. In any event, the conduct involved in simple possession of illicit whiskey has precious little to do with the state of mind involved

in conspiracy with intent to defraud or carrying on the business of a distiller with intent to defraud.

[14] Even if we were to assume that the prior conviction had some probative value in the present case, the government has done little to show any actual need for that evidence in view of other available evidence. Terry Lee Smith, the alleged co-conspirator, testified that McDuffie helped weld the still pots, helped mix the mash for fermentation, paid Smith for work at the still, and furnished a condenser, a still cap, wheat shorts, and plastic containers to Smith to be carried to the Macon area. If the jury believed that McDuffie actually performed these acts, they logically would infer from that conduct that he possessed the requisite criminal intent. *See* Fallen v. United States, 5 Cir. 1955, 220 F.2d 946, 948, cert. denied, 350 U.S. 924, 76 S.Ct. 213, 100 L.Ed. 808.

In its brief on appeal the government lists several instances during McDuffie's trial testimony in which he offered innocent explanations for potentially suspicious acts (e. g., a fingerprint on a jug found at the still site and a $1500 check from McDuffie to Miller). The divergent explanations, however, would appear to relate more to actual participation in the conspiracy than to intent. Moreover, the thrust of McDuffie's defense was alibi, not lack of criminal purpose. Finally, the government's argument that McDuffie's testimony created a prosecutorial need to introduce prior crime evidence bears the stamp of disingenuousness, since the prior conviction was in-

troduced into evidence during the government's case-in-chief before McDuffie ever took the stand.

On the other side of the scale, although the trial court carefully instructed the jury to consider McDuffie's prior conviction only on the issue of intent, we believe there is a substantial possibility that such evidence could lead a jury to believe that the defendant is the type of person who engages in moonshining. And as Judge Rives has said: "Our law makes some allowance for the possibility of reform, and does not yet say 'once a moonshiner, always a moonshiner.'" Baker v. United States, 5 Cir. 1955, 227 F.2d 376, 378-379 (Rives, J., concurring).

[15] All that we demand of trial courts and litigants in this seemingly complex area of criminal jurisprudence is that they deal in reason, not categories. The treasured principles underlying the rule against admitting evidence of other crimes should be relaxed only when such evidence is genuinely needed and would be genuinely relevant.

> This Court has never hesitated to approve the admission of other-crime evidence when that evidence has been relevant under one of the exceptions to the general rule. We have recognized, however, and we must continue to recognize, that the various categories of exceptions—intent, design or plan, identity, etc.—are not magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.

United States v. Goodwin, *supra*, 492 F.2d 1155.

IV. SUSAN McDUFFIE WEEKS

[16] In addition to her Business Records Act claim [15] and her discovery claim,[16] defendant Susan McDuffie Weeks contends that the government failed to offer sufficient evidence to support a conviction for conspiracy, and that the trial court therefore erred by denying her motions for judgment of acquittal. Having examined the record with great care, we concede that the issue is extremely close; but we conclude ultimately that the evidence was sufficient to go to the jury and that the trial court did not err by refusing to order a judgment of acquittal.

In analyzing the evidence against defendant Weeks, we begin with the oft-quoted standard set forth by the Supreme Court in Glasser v. United States, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704:

> The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. . . . Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and collocation of circumstances".

As in every case resting on circumstantial evidence it is unnecessary to find either the smoking pistol or the bottle of non-tax-paid whiskey in the hand of the defendant. This Court has held that, once a conspir-

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[15] *See* Part I A, *supra*.

[16] *See* Part I B, *supra*.

acy is established, the government need only show "slight evidence" that a particular person was a member of the conspiracy. United States v. Morado, 5 Cir. 1972, 454 F.2d 167, 175, cert. denied, 406 U.S. 917, 92 S.Ct. 1767, 32 L.Ed.2d 116; United States v. Warner, 5 Cir. 1971, 441 F.2d 821, 830, cert. denied, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58. As we cautioned in *Morado*, however,

> [o]ur adherence to the "slight evidence" rule should make us nonetheless insistent that guilt remain "individual and personal" and that the government show beyond a reasonable doubt that each and every alleged member of the conspiracy had the deliberate, knowing, specific intent to join the conspiracy.

454 F.2d at 175.

The government's evidence in the case *sub judice* clearly indicates that a conspiracy existed and that defendant Weeks performed acts whose effect was to further that conspiracy. Weeks' claim of insufficient evidence rests on the argument that the government failed to prove that she had knowledge of the conspiracy or that she intentionally acted to further its objectives, both of which are prerequisite to conviction. *See* Causey v. United States, 5 Cir. 1965, 352 F.2d 203, 207; Duke v. United States, 5 Cir. 1956, 233 F.2d 897, 901. Although we recognize that knowledge of a conspiracy is seldom capable of direct proof and must usually appear from surrounding circumstances, United States v. Martinez, 5 Cir.

1973, 486 F.2d 15, 24, we also demand that "the evidence of knowledge must be clear, not equivocal. . . . because charges of conspiracy are not to be made out by piling inference upon inference. . . ." Ingram v. United States, 1959, 360 U.S. 672, 680, 79 S.Ct. 1314, 1320, 3 L.Ed.2d 1503, *quoting* Direct Sales Co. v. United States, 1943, 319 U.S. 703, 711, 63 S.Ct. 1265, 87 L.Ed. 1674.

Defendant Weeks is the daughter of defendant McDuffie, and until late 1972 or early 1973 was employed as a secretary by defendant Miller in his business as a manufacturer's representative. Much of the government's evidence of Weeks' involvement in the conspiracy related to Weeks' activities in her secretarial capacity. First, the government introduced evidence to show that Weeks had rented a post office box at Kathleen, Georgia, in the name of John Carroll, Vice President, Trans Aero Corporation. (Defendant Miller allegedly had used Trans Aero as a cover for certain of his illicit operations). Weeks testified, however, that in renting the post office box at the direction of her employer, she was doing only what she had often done before as a courtesy for companies represented by Miller; she frequently signed the names of corporations and their officers in connection with her work. Weeks made no effort to conceal her identity when she rented the box; she followed her signing of John Carroll's name with the word "by" and her initials.

The government also showed that Weeks had arranged with Flint Electric Company to have elec-

tricity turned on, in the name of Trans Aero Corporation, at the Kathleen, Georgia warehouse where the distillery was later discovered. Weeks noted that she had had electricity connected on several previous occasions at Miller's direction, that she again accompanied the corporate signature with her own initials, and that she was well known at Flint Electric, where she regularly paid her own electric bills in person.

In addition, evidence was presented which established that Weeks had partially filled out money orders to Walter Puhan, the owner of the property on which the still was found, and that those money orders bore notations indicating that they were in payment for the Kathleen, Georgia warehouse for specified periods of time. Weeks gave uncontradicted testimony, however, that Miller customarily placed bills on her desk with checks or money orders attached for her to fill out.

The government also offered evidence that Weeks had a citizens' band radio antenna on her house similar to one found at the location of the illicit still twelve miles from Weeks' home. No evidence was introduced, however, to indicate that her antenna was connected to radio equipment; moreover a representative of the distributing company testified that such radios could not be used for private conversations and that the average antenna range was only five miles. The government also introduced telephone company records to establish that numerous toll calls had been made between Weeks' residence and defendant McDuffie's residence, a situation not difficult to

understand in view of the parent-child relationship, and particularly at a time when daughter Weeks (at that time, Susan McDuffie) was planning her wedding.

If the evidence thus far described had been the only information adduced at trial, we would be compelled to conclude that the jury *must* have entertained a reasonable doubt as to Weeks' knowledge of the conspiracy. None of that evidence is inconsistent with the hypothesis urged by Weeks that she was acting innocently in her capacity as McDuffie's daughter and Miller's secretary.

Two final items of evidence, however, when considered together, demonstrated enough inconsistency in Weeks' theory to make the government's case strong enough to submit to the jury. First was the testimony of witness Henry McDowell, with whom Miller had discussed his distillery operations and from whom Miller sought to obtain large quantities of sugar and plastic jugs. Asked whether, in a meeting on January 2, 1973, Miller had given him any instructions as to how to contact him, McDowell replied:

> He told me if I would call his office and I had any information for him at all just to give it to his secretary, that there would be no problem, that she knew what was going on and just give her that information. (Record, Vol. III, p. 303).[17]

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[17] Weeks raised no objection, either at trial or on this appeal, to the introduction of McDowell's testimony; and the

Weeks argues that McDowell's testimony is meaningless as to her participation in the conspiracy, since she terminated her employment with Miller at Christmas of 1972, and the record is silent as to the identity of Miller's secretary on January 2, 1973.

A second piece of evidence, however, appears to cast doubt on Weeks' argument. Philip White, a handwriting expert, testified that, through a comparison of writing samples, he had determined that Weeks "probably" wrote[18] a money order sent to Walter Puhan (the owner of the still site property) on January 8, 1973. From this testimony the jury could reasonably have reached either of two damaging conclusions: 1) that Weeks had misstated the date of her termination as Miller's secretary and that she was in fact in Miller's employ on the date of Miller's incriminating comment to McDowell; or 2) that Weeks filled out money orders in furtherance of the illicit distillery operation, not as an innocent secretary, but even beyond her secretarial tenure as a knowing member of the conspiracy. In either case the jury could have decided that Weeks, if less than

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declarant, defendant Miller, took the stand and was available for cross-examination on this subject. Therefore, we need not consider whether the evidence fell within the confines of the federal co-conspirator exception to the hearsay rule.

[18] White stated that he had six categories of characterizations for handwriting comparisons: that the person who made the writing on A *made* the writing on B; *probably made* the writing on B; *could have made* the writing on B; *probably did not make* the writing on B; *did not make* the writing on B; or that White is *unable to determine* who made the writing on B.

a majordomo, was more than a cubicle secretary or an unsuspecting pawn.

We emphasize that we consider the government's case against Weeks to be far from overwhelming. In reading and analyzing the record, we found the barometric pressure of guilt rising and falling. As in all sufficiency of the evidence cases, our opinion is tied closely to its facts. Although we have not written an opinion for all seasons, or for all stills, we are satisfied that the jury could, on the basis of the government's evidence, have felt the wintry blast of Weeks' guilt beyond a reasonable doubt.

V. CONCLUSION

The judgment is affirmed as to defendant Weeks. As to defendants Miller and McDuffie, the judgments are reversed and the case remanded for further proceedings not inconsistent with this opinion.

Affirmed in part; reversed in part, and remanded for new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1973

No. 73-2405

D. C. Docket No. CR 9035

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

MITCHELL MILLER, SUSAN MCDUFFIE WEEKS, and JOHN HENRY MCDUFFIE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Middle District of Georgia

Before GEWIN, GOLDBERG and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

September 13, 1974

Issued as Mandate:

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2405

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

MITCHELL MILLER, SUSAN MCDUFFIE WEEKS, and JOHN HENRY MCDUFFIE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Sept. 13, 1974, 5 Cir., 1974 —— F.2d ——)

(January 15, 1975)

Before GEWIN, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing filed on behalf of Appellee (U.S.A.) is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

SIMPSON, Circuit Judge, joined by BROWN, Chief Judge, and BELL, AINSWORTH, DYER, RONEY and GEE, Circuit Judges, dissenting:

With deference, we here enter our vigorous dissent from the full court's failure, by a narrow 8-7 vote, to grant the Petition of the United States for Rehearing en Banc. Our dissent is dictated by two basic reasons.

In the first place, the panel opinion departs radically from prior decisions denying to bank customers the standing to challenge subpoenas of bank records of their accounts. We disagree with the panel holding that such a result is either required or supported by *California Bankers Association* v. *Schultz*, 1974, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812. Neither may the panel decision be justified under the copying and reporting requirements of the Bank Secrecy Act of 1970, 12 U.S.C., §§ 1829b, 1730d, 1951-59, and its implementing regulations, 31 C.F.R. § 103.34(b)(3) (1973) and 31 C.F.R. § 103.36 (1973). The panel opinion appears to be oblivious to the momentous change it would put in motion by its cursory treat-

ment of the question of standing and its bland assumption that the depositor-appellant Miller had standing here to attack the subpoenas duces tecum directed to the banks.

Secondly, if the presence of standing on the part of the depositor is assumed *arguendo*, and the merits of the panel decision are considered, we disagree that the process involved here was so infirm as to dictate reversal of the district court. Finding the process faulty, the panel reverses without determining whether the alleged error is of such a nature as to require reversal. The implication is that faulty process *per se* is reversible error. We do not at all agree that the process below was faulty, but assuming that it was, prejudice to the appellant from such defect was not shown to have resulted and hence reversal is not indicated.

The following facts emerge from the panel opinion and from the briefs of the parties before the panel and the petition for rehearing en banc of the United States.

The appellant Miller and four others were indicted for conspiracy to defraud the United States in connection with the manufacture and possession of non-tax-paid distilled spirits, 18 U.S.C. § 371 and 26 U.S.C. §§ 5601, et seq., and corresponding related substantive offenses. Miller was the hub of the conspiracy, its source of necessary operating funds, its guiding intelligence and the director of its operations. At a second trial, following a mistrial, he was convicted by a jury of conspiracy and of the three sub-

stantive charges for which he was tried. Concurrent three year confinement sentences were imposed on him. Miller's conviction is reversed for retrial by the panel decision.

The alleged trial error with which we are concerned on the Petition of the United States for Rehearing en Banc is the admission into evidence of microfilm copies of Miller's bank checks kept pursuant to the record-keeping provisions of the Bank Secrecy Act and obtained by grand jury subpoenas duces tecum directed to two banks at which he conducted banking business. On appeal, Miller challenged the legality of the subpoenas as not issued under the direction of the court, because no return was made on them, and because they were returnable to a date when the grand jury was not scehduled to be in session.[1] The two banks allowed inspection by revenue agents on the bank premises; the bank representatives were then relieved of any obligation to appear before the U. S. Attorney or before the grand jury.

The panel accorded to Miller the requisite standing to complain of the claimed illegality of the subpoenas duces tecum, and held that the subpoenas were fatally defective. The bank's waiver of defects was held not to bind the depositor Miller because of his

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[1] The subpoenas issued at the request of the United States Attorney on January 23, 1973 and ordered production of the bank records before the grand jury on January 24. The grand jury did not meet, however, until February 12.

protected interest in bank records kept pursuant to the Bank Secrecy Act and pertaining to his account.

The panel's grounds for this decision are unclear. Language in the opinion indicates both that the panel considered Miller to have an ownership interest and a cognizable privacy interest.[2] But the new interest is recognized in the customer in order to prevent the copying requirements of the Bank Secrecy Act from being used as a means of circumventing the protection accorded an individual's "private papers" by the Fourth Amendment. See *Boyd* v. *United States*, 1886, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746.[3] Once a protected right in the bank records is established, a depositor's standing follows.

Ruling *sub silentio* that a depositor has standing to challenge a grand jury subpoena of bank records

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[2] We note in this connection the panel's reliance upon *Boyd* v. *United States*, 1886, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, dealing with the compulsory production of an individual's "private papers", and reference to "their [i.e. the depositors'] records", 500 F.2d at 757, along with the statements that "an unlawful invasion of *Miller's* privacy" occurred, *Id.* at 756 (emphasis added) and that "he whose rights are threatened by the improper disclosure here was a *bank depositor*, not a bank official." Id. at 758 (emphasis added).

[3] [The government]

> may not cavalierly circumvent *Boyd's* precious protection by first requiring a third party bank to copy all of its depositors' personal checks and then, with an improper invocation of legal process, calling upon the bank to allow inspection and reproduction of those copies.
> 500 F.2d at 757.

of his account,[4] the panel renounces earlier case law and accords to a depositor rights that he never enjoyed prior to passage of the Bank Secrecy Act. With unanimity the earlier cases denied to a depositor the standing to challenge IRS subpoenas of bank records pertaining to his banking transactions, including microfilm copies of checks. See *Harris* v. *United States*, 9 Cir. 1969, 413 F.2d 316; *Galbraith* v. *United States*, 10 Cir. 1968, 387 F.2d 617; *O'Donnell* v. *Sullivan*, 1 Cir. 1966, 364 F.2d 43, cert. denied 385 U.S. 969, 87 S.Ct. 501, 17 L.Ed.2d 433; *Application of Cole*, 2 Cir. 1965, 342 F.2d 5, cert. denied 381 U.S. 950, 85 S.Ct. 1803, 14 L.Ed.2d 723; *DeMasters* v. *Arend*, 9 Cir. 1963, 313 F.2d 79, cert. dism. 375 U.S. 936, 84 S.Ct. 341, 11 L.Ed. 2d 269; *Foster* v. *United States*, 2 Cir. 1959, 265 F.2d 183, cert. denied 360 U.S. 912, 79 S.Ct. 1297, 3 L.Ed.2d 1261.[5] Such records were deemed to be the property of the bank, and the cases denied recognition of any depositors' rights to them, whether sought under an ownership theory, see *Harris*, supra, *Galbraith*, supra; *O'Donnell*, supra, *Application of Cole*, supra, *DeMasters*, supra, *Foster*, supra, or by virtue of an agency

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[4] The panel opinion glides over the standing issue. At a minimum, a more detailed explanation of the panel's reasons for its action should be accorded to the United States.

[5] The records in the cases cited in the text encompassed books, papers, records, memos, and included signature cards, ledger sheets, deposit slips, credit files, applications for loans, financial statements, loan ledger sheets, memos relating to secured or unsecured commercial and personal loans, microfilms of checks and of debit memos charged to an account.

theory, see *Harris*, supra, and *Shulze* v. *Rayunec*, 7 Cir. 1965, 350 F.2d 666, cert. denied *Boughner* v. *Shulze*, 382 U.S. 919, 86 S.Ct. 293, 15 L.Ed.2d 234. Accordingly, as the Ninth Circuit held in *DeMasters*, supra, if any right was violated, the right was that of the bank, not the customer, and the bank could waive any right it might have to resist production under subpoena. 313 F.2d at 85.

While we have not located any case in which a depositor claimed a cognizable privacy interest sufficient to confer standing under *Katz* v. *United States*, 1967, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, at least one post-*Katz* case which denied standing recognized that a check cannot be considered a confidential communication. See *Harris*, supra. When a customer writes a check, he "set[s] the check afloat on a sea of strangers", and knows when he does so that it

> will be viewed by various employees at the bank where it is cashed or deposited, at the clearing house through which it must pass, and at his own bank to which it will eventually return.

413 F.2d at 320-21. It is a negotiable instrument in commerce. See *Harris*, supra; *California Bankers*, 416 U.S. at 48-49, 94 S.Ct. at 1511, 39 L.Ed.2d at 833. A drawer has no assurance that his payee will not endorse, nor that the endorsee will not further endorse. Nor can he prevent this. In drawing a check, he does not exhibit an actual expectation of privacy which society is prepared to accept as reasonable. See *Katz*, 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 588 (Harlan, J., concurring).

The question presented by the government petition, which this Court by a one-vote margin declines to consider en banc, is whether the intervening statutory *requirement* of the Bank Secrecy Act of 1970 that banks compile and retain records of transactions with their customers, including microfilming, held constitutional in *California Bankers*, conferred standing upon depositors where it was not previously recognized.[a] Our position is that standing was not so conferred.

The fact that the United States by statute now requires banks to microfilm checks and other records of dealings with customers makes such records no more the property of the customer than they were when the banks microfilmed voluntarily. As the Supreme Court noted in *California Bankers*, the bank is not a disinterested bystander, but is a party to the transaction. 416 U.S. at 48-49, 94 S.Ct. at 1511, 39 L.Ed.2d at 833. It pays for the records and stores them. It could not be seriously contended that a customer has a right to them sufficient to obtain and retain possession of them. While of course the rec-

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[a] It should be pointed out that this precise issue was expressly reserved by the Supreme Court:

> Claims of depositors against the compulsion by lawful process of bank records involving the depositors' own transactions must wait until such process issues.

416 U.S. at 51-52, 94 S.Ct. at 1512, 39 L.Ed.2d at 835.

ords pertain to customers' accounts, they do not *ipso facto* become the depositors' records.

Nor is it any more reasonable now than heretofore to have a "reasonable expectation of privacy". Indeed it is less reasonable, because the records are now required to be maintained by statute, whereas prior to the passage of the Act microfilms were kept at the business discretion of banks, and customers were not informed of the practices of their own bank, or of other banks involved in the collecting process. See *Harris*, supra. Any one of the checks in the instant case might as easily have been endorsed by the payee to a third party. The privacy which is alleged to exist actually rests not in the expected confidentiality of communications with one's bank but in the belief that a party to a check will remain anonymous because viewers of the instrument will not know who he is, attach significance to the transaction, or remember its details.[7] We consider it an anomaly that

[7] Of course, the customer may reasonably expect that the bank will not release information pertaining to his affairs indiscriminately, to any chance person off the street making inquiries. This expectation may rest upon contract or fiduciary concepts, and may even be enforceable against the bank under state law. Fear of suit or the desire to retain or increase deposits may well impel a bank to contest a faulty subpoena, to give notice to the depositor that records of his account are sought, and to protect the customer's interests otherwise to the extent legally permissible. None of this however would suffice to protect a customer from a lawfully issued subpoena directed to a bank nor would it give him standing to contest it. See *McMann* v. *Securities and Exchange Commission*, 2 Cir. 1937, 87 F.2d 377, cert. denied, 301 U.S. 684, 57 S.Ct. 785, 81 L.Ed. 1342.

a statute designed to grant greater government access to bank records results here in a restriction on government access to such records. The result reached stands the statutory scheme on its head.

The Supreme Court decision in *California Bankers* does not compel a different result. The precise issue before the panel of this Court was there reserved for decision. See n. 6, *supra*. But the Supreme Court noted expressly that:

> We decided long ago that an Internal Revenue summons directed to a third-party bank was not a violation of the Fourth Amendment rights of either the bank or the person under investigation by the taxing authorities. See First National Bank v. United States, 267 U.S. 576, 45 S.Ct. 231, 69 L.Ed. 796 (1925), aff'g 295 F. 142 (SD Ala. 1924); Donaldson v. United States, 400 U.S. 517, 522, 91 S.Ct. 534, 538, 27 L.Ed. 2d 580 (1971). "[I]t is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of taxpayer, even if a criminal prosecution is contemplated or in progress." Donaldson v. United States, supra, at 537, 91 S.Ct. at 545 (Douglas, J., concurring).
>
> 416 U.S. at 53, 94 S.Ct. at 1513, 39 L.Ed.2d at 835.[8]

Although the Court recognized that the bank acts under compulsion of the statute in taking checks and

[8] Cf. *Couch* v. *United States*, 1973, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548; *White* v. *United States*, 5 Cir. 1973, 477 F.2d 757, aff'd en banc, 5 Cir. 1973, 487 F.2d 1335.

making the microfilms, "it is equally clear that in doing so *it neither searches nor seizes records in which the depositor has a Fourth Amendment right.*" 416 U.S. at 54, 94 S.Ct. at 1513, 39 L.Ed.2d at 836 (emphasis added). We find trouble in understanding the process by which a depositor acquires a greater Fourth Amendment right in the copies produced. See dissenting opinion of Mr. Justice Marshall, 416 U.S. at 97, 94 S.Ct. at 1535, 39 L.Ed.2d at 861, in which he points out that the majority opinion intimates a lack of standing on the part of customers respecting copies. This Court's panel in *Miller* confuses the rights of the banks with the rights of their depositors.[9]

Going to our second objection to the panel holding, and assuming that appellant Miller had standing to challenge the validity of the subpoenas, we do not agree that they were defective. And even if the subpoenas were defective, no prejudice is shown such as to rquire their suppression. This court at a minimum should remand for hearing and determination by the district court as to whether the government was preparing in good faith for presentment of pertinent records to the grand jury or was merely on a "fishing expedition".

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[9] The Supreme Court's concern as to limiting access to records "by existing legal process" alluded to by the panel opinion, 500 F.2d at 757, is not inconsistent with this position Under existing legal process only the banks have standing to object.

The process referred to by the Supreme Court in *California Bankers* is "*existing*" legal process. 416 U.S. at 52, 94 S.Ct. at 1513, 39 L.Ed.2d at 835. That case imposed no stricter standard where bank records are the object demanded for production than for production of any other type of record.[10]

The *Miller* panel's finding of defectiveness apparently stems from three circumstances: (1) the delay of nineteen days between the issue date of the subpoenas and the scheduled grand jury meeting, (2) the lack of a return on the process, and (3) the fact that the U. S. Attorney, rather than the court or the grand jury, initiated the process.[11] We are persuaded

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[10] Mr. Justice Powell, in his concurring opinion joined by Mr. Justice Blackmun, expressed concern over the potential for abuse should the regulation's reporting requirements be significantly extended. 416 U.S. at 78-79, 94 S.Ct. at 1526, 39 L.Ed.2d at 850-51. This concern arises because

> the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate.

416 U.S. at 79, 94 S.Ct. at 1626, 39 L.Ed.2d at 850-51. But the *Miller* panel of this Court faced an entirely different situation. The reporting provisions are not involved in this case. Access was sought by means of "judicial process", i.e. grand jury subpoena, to copies of bank records. Further, the subpoena when issued was subject to scrutiny by a neutral magistrate should its validity be challenged by individuals with standing. See F.R.Crim.P. 17(c).

[11] See the statement, 500 F.2d 757-758:

> Surely a purported grand jury subpoena, issued not by the court or by the grand jury, but by the United States

nonetheless that the subpoenas were not faulty so long as the U. S. Attorney was preparing in good faith for the grand jury session. *Morton Salt*, infra.

The panel finds merit in Miller's objection that the subpoenas were not issued at the direction of the court or at the instance of the grand jury, but solely at the discretion of the U. S. Attorney.[12] There is no basis for valid objection to this practice. It is entirely normal and usual, has been repeatedly upheld, is necessary to the efficient investigation of crime by conserving a grand jury's time, and is authorized by F.R.Crim.P. 17(a). See *United States* v. *Culver* (D. Md. 1963) 224 F.Supp. 419; *In re Subpoena Duces Tecum* (E.D. Tenn. 1916) 248 F. 137.

United States v. *Morton Salt Co.* (D.Minn. 1962), 216 F.Supp. 250, aff'd 382 U.S. 44, 86 S.Ct. 181, 15

Attorney's office, for a date when no grand jury was in session, and which in effect compelled broad disclosure of Miller's financial records to the government, does not constitute sufficient "legal process" within the meaning of the majority opinion.[6]

This *ad hominem* statement, together with a footnote (n. 6, at p. 758 of 500 F.2d) and accompanying text, revisiting Mr. Justice Powell's *caveat* (416 U.S. at 78-79, 94 S.Ct. at 1526, 39 L.Ed.2d at 850-851), represents the closest approach of the *Miller* panel to a statement of reasons for finding the process defective.

[12] Miller argues on brief that the subpoenas did not issue under an order of court, an apparent basis in part for the court's decision. We assume in this dissent that Miller's complaint—that the subpoenas did not issue when the grand jury was in session—includes a claim of defectiveness because not issued at the grand jury's request.

L.Ed.2d 36, is closely in point. In *Morton Salt* the U.S. Attorney procured a subpoena duces tecum issued from the office of the clerk of the court on December 28, 1959, although the grand jury was not to be impaneled until February 17, 1960. The defendants contended that this procedure was improper. The court termed this argument "patently unsound". 216 F.Supp. at 257. The special prosecutor, an attorney from the Anti-Trust Division of the Department of Justice, was duly authorized to conduct the investigation, and acted under his authority in procuring the issuance. *Id.*

The *Miller* panel opinion also relies on the circumstances that no grand jury was in session when the subpoenas issued and that no returns were made of service thereon.

We stated in *United States* v. *Hedge*, 5 Cir. 1972, 462 F.2d 220, 223, that a witness subpoena for a trial was properly returnable only at the place of trial, and that a subpoena directing witnesses to appear at the U. S. Attorney's office on the Sunday before trial was improper, citing Rule 17(a) F.R. Crim.P., but refused to find prejudice to the appellant in the violation of the rule. Accord, *United States* v. *Standard Oil Co.*, 7 Cir. 1963, 316 F.2d 884. We find no conflict between the position we take and the view announced in *Hedge*, supra. It bears emphasis that *Hedge* dealt with a trial situation, in contrast to the grand jury investigation involved in *Miller*. In our judgment, the difference is controlling. To the extent, if any, that *Hedge* announces a

rule at variance with the Supreme Court's holding in *Morton Salt*, supra, it should go without saying that we must follow the Supreme Court.

The U. S. Attorney is the guiding arm of the grand jury, concerned with the orderly presentation of information before that body. It is customary practice in the courts for documents and witnesses to be subpoenaed in advance to eliminate unnecessary material, allow for the orderly presentation of evidence, and save the time of grand jurors.[13] See *United States* v. *Johns-Manville Corp.*, E.D. Pa. 1962, 213 F.Supp. 65, n. 20 at 73-74. To refuse the U. S. Attorney power to subpoena documents before the grand jury actually meets in situations where he is preparing in good faith to make a presentation to the grand jury substantially interferes with the orderly operation of that body.

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[13] In *Morton Salt, supra,* an impounding order was issued by the court on January 25, 1960, after the subpoena was issued. The trial court held that the right of government counsel to inspect the documents before presenting them to the grand jury fell within the scope of F.R.Crim.P. 17(c). 216 F.Supp. at 257. Whether a court order is mandatory was not addressed. Our tendency would be to hold that it is not. Interpretations of F.R.Crim.P. 17(c) indicate that the provision for court order was designed to apply, not in situations as in *Miller*, but to pretrial production of documents in order to expedite trials and avoid delays while parties search for and read documents before offering them into evidence. See 8 Moore's Fed. Prac. ¶ 17.07; 1 Wright. Fed. Prac. and Proc. § 274 at 550-51. Even in this situation, the jurisprudence is unclear as to whether the court's discretion must be invoked. See 1 Wright, Fed. Prac. and Proc. § 274 at 551.

The grand jury in the instant case did in fact meet nineteen days after the subpoenas duces tecum were issued. There should be no suspicion of prosecutorial bad faith on the sole basis of production being sought at a time prior to the date when the grand jury was to meet. We do not read Miller's allegations of a "fishing expedition" to urge that the records were not sought on behalf of the grand jury for an investigation by that body. If they are to be so construed, a remand is in order for a hearing as to whether the U. S. Attorney was or was not preparing in good faith to present relevant matters to the grand jury.

Finally, even if it is held that the process was defective because the grand jury was not in session, we indicated in *Hedge*, supra, that a showing of prejudice was necessary before corrective action should be ordered. It is impossible to read prejudice as present *ipso facto* on the basis of the grand jury being out of session, or the failure to endorse a return on the process.

For the foregoing reasons, we dissent from the failure of the court to consider this case en banc. This decision, now permitted to stand, will impose severe handicaps to the orderly conduct of official business by U. S. Attorneys throughout this Circuit.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 570226 117

Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1179

UNITED STATES OF AMERICA,

Petitioner

—v.—

MITCHELL MILLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MARCH 17, 1975
CERTIORARI GRANTED JUNE 9, 1975

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1179

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

MITCHELL MILLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RELEVANT DOCKET ENTRIES

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT
9035

DATE	PROCEEDINGS
1973	
3-15	Filed Indictment and Vote of the Grand Jury.
3-15	J. S. 2 Report prepared.
3-16	Warrant for Arrest of Defendant JOHN HENRY McDUFFIE issued.
3-19	Filed Appearance Bond for JOHN HENRY McDUFFIE.
3-15	Filed Appearance Bond for MITCHELL MILLER in amount of $5,000.00.
3-15	Filed Appearance Bond for JOSEPH KENNETH BROOKS in the amount of $5,000.00.
3-15	Filed Appearance Bond for TERRY LEE SMITH in the amount of $5,000.00.
3-15	Filed Appearance Bond for SUSAN McDUFFIE WEEKS in the amount of $5,000.00.
3-21	Plea of Not Guilty entered by MILLER, SMITH, WEEKS & McDUFFIE.
3-21	Filed Motion for Discovery and Inspection by MILLER.
3-21	Filed Motion to Compel Disclosure of Exculpatory Material and Information by MILLER.
3-28	Filed Motion for Additional Peremptory Challenges by SMITH.
3-28	Filed Motion to Suppress Evidence by SMITH.
3-28	Filed Motion for Discovery and Inspection by SMITH.

DATE	PROCEEDINGS

3-28 Filed Motion for Disclosure by SMITH.

3-28 Filed Motion to Suppress Evidence and Statements by MILLER.

3-28 Filed Motion for Additional Peremptory Challenges as to MILLER.

3-28 Filed Motion for Severance and Separate Trial as to MILLER.

3-28 Filed Motion for Bill of Particulars as to MILLER.

3-28 Filed Motion to Suppress Evidence as to MILLER re seizure of distillery.

3-28 Filed Motion to Suppress Evidence as to MILLER re seizure of van truck.

4-3 Filed Motion for Discovery as to Weeks.

4-3 Filed Motion for Severance as to Weeks.

4-4 Filed Motion to Suppress as to Weeks.

4-4 Filed Motion for Discovery as to McDuffie.

*4-4 Filed Motion to Suppress as to McDuffie.

4-18 Filed Stipulation of Fact and Testimony between the United States and Defendant Mitchell Miller as to the testimony of Mr. Barry Jones, President, C&S Bank of Warner Robins, Georgia, if he were called to testify in behalf of Mitchell Miller on his Motion to Suppress Documentary Evidence secured from the bank by ATF Agents.

4-18 Filed Stipulation of Fact and Testimony between the United States and Defendant Mitchell Miller as to the Testimony of Mr. Harold Peavy, President, Bank of Byron, Byron, Georgia, if he were called to testify in behalf of Mitchell Miller on his Motion to Suppress Certain Documentary Evidence secured from the bank by ATF Agents.

DATE	PROCEEDINGS

4-19 Filed Order of Judge Wilbur D. Owens, Jr., Granting Defendants' Motion to Suppress.

4-18 Filed Motion for Continuance of Trial as to MITCHELL MILLER.

4-20 Filed Motion to Dismiss Indictment as to SUSAN McDUFFIE WEEKS.

4-20 Filed Motion to Strike as to TERRY LEE SMITH.

4-20 Filed Motion for Evidentiary Hearing as to MITCHELL MILLER.

4-20 Filed Motion to Strike as to MITCHELL MILLER.

4-20 Filed Motion for Continuance as to KEN BROOKS.

4-20 Filed Motion for the Court to consider all motions filed on behalf of the co-defendants in this indictment as adopted by KEN BROOKS and that the Court rule on said motions as they might apply to this defendant.

4-20 Filed Motion for Evidentiary Hearing as to TERRY LEE SMITH.

4-20 Plea of Not Guilty entered by JOSEPH KENNETH BROOKS.

4-23 Filed Motion to Strike Matter as Surplusage by Defendant Susan McDuffie Weeks.

4-23 Filed Order for Dismissal of Indictment as to TERRY LEE SMITH.

4-23 J. S. 3 Report prepared as to TERRY LEE SMITH.

4-23 Filed Order of Judge Wilbur D. Owens, Jr., that TERRY LEE SMITH give testimony or provide other information which he refuses to give or to provide on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated, this order to become effective only if after the date of this order said TERRY LEE SMITH refuses to testify.

DATE	PROCEEDINGS

4-23 Filed MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANTS' MOTIONS TO SUPPRESS.

4-23 Filed motion of the United States Attorney for the Court to issue an order pursuant to the provisions of Title 18, U.S. Code, Section 6001, et seq., compelling TERRY LEE SMITH to give testimony which he refuses to give on the basis of his privilege against self-incrimination, with the approval of the Assistant Attorney General of the United States, Criminal Division, Department of Justice.

4-23 Filed Request for Voir Dire by Defendant MITCHELL MILLER.

4-23 Filed Order of Judge Wilbur D. Owens, Jr., denying the Motion to Dismiss Indictment of SUSAN McDUFFIE WEEKS.

4-24 Filed original page 4 of the Indictment which was removed from the Indictment and replaced with a new page 4 in open court at the direction of Judge Wilbur D. Owens, Jr.

4-24 Filed Order to Show Cause in Re Contempt, John A. Carroll to show cause before this Court within twenty-four (24) hours of service of this order in U.S. District Court, Macon, Georgia, why he should not be held in contempt of Court, Judge Wilbur D. Owens, Jr.

4-30 Filed Defendant Miller's Request to Charge.

4-30 Filed Defendant Weeks' Request to Charge.

5-1 Filed question from jury to the Court. (at direction of the Court.)

5-1 Trial by Jury, Judge Wilbur D. Owens, Jr., presiding.

DATE	PROCEEDINGS

5-1 Filed Order of Judge Wilbur D. Owens, Jr., declaring mistrial, the jury being unable to arrive at a verdict as to all defendants.

5-3 Filed Motion for Continuance of Trial as to MITCHELL MILLER.

5-14 Second Trial by Jury, Judge Wilbur D. Owens, Jr., presiding.

5-14 Verdict: MITCHELL MILLER—Guilty on all counts.
SUSAN McDUFFIE WEEKS—Guilty on Count 1.
JOHN HENRY McDUFFIE—Guilty on all counts.

6-6 Sentence: MITCHELL MILLER—Cts. 1, 2, 3, 4, 5, 36 months imprisonment on each count concurrent.
SUSAN McDUFFIE WEEKS—Ct. 1, 5 years probation with supervision.
JOHN HENRY McDUFFIE—Cts. 1, 2, 3, 4, 5, 36 months imprisonment each count concurrent.

Judge Wilbur D. Owens, Jr.

(Criminal Order File, Vol. 7, p. 1116, 1117, 1118)

6-6 J. S. 3 Report prepared for MITCHELL MILLER, SUSAN McDUFFIE WEEKS and JOHN HENRY McDUFFIE.

6-6 Filed Notice of Appeal for MITCHELL MILLER.

6-6 Filed Notice of Appeal for SUSAN McDUFFIE WEEKS.

6-6 Filed Notice of Appeal for JOHN HENRY McDUFFIE.

DATE	PROCEEDINGS

6-6 Filed Order of Judge Wilbur D. Owens, Jr., allowing appeal bond for MITCHELL MILLER and JOHN HENRY McDUFFIE in the amount of $10,000.00 each.

6-6 Filed Appeal Bond for MITCHELL MILLER in the amount of $10,000.00.

6-6 Filed Appeal Bond for JOHN HENRY McDUFFIE in the amount of $10,000.00.

5-7 Filed REQUEST FOR VOIR DIER BY MILLER.

6-7 Plea of Not Guilty entered by JOSEPH KENNETH BROOKS entered on April 20, 1973, is withdrawn and a plea of Guilty to Count 5 entered.

6-7 Sentence: JOSEPH KENNETH BROOKS—Ct. 5, I.S.S., 5 years probation with supervision.

6-7 Filed Order for Dismissal of Counts 1, 2, 3 and 4 as to JOSEPH KENNETH BROOKS.

6-7 J. S. 3 Report prepared, as to JOSEPH KENNETH BROOKS.

*4-17 Filed Electronic Recording of Plea; Defts. 1, 3, 4, 5; Record #209.

7-11 Filed Order of Judge Wilbur D. Owens, Jr., ordering that the time for preparation and filing of the record and transcript on appeal is extended so as to expire on the ninetieth day following the filing of the notices of appeal.

6-14 Filed Electronic Recording of Plea; Deft. 2, Record #210.

8-23 Filed MOTION FOR REDUCTION AND MODIFICATION OF SENTENCE BY DEFENDANT MITCHELL MILLER.

8-24 Filed Order of Judge Wilbur D. Owens, Jr., denying Mitchell Miller's motion for reduction and modification of sentence.

DATE	PROCEEDINGS

9-6 Filed Transcript of Trial and Motions in 3 volumes from April 18, 1973, through May 14, 1973.

9-6 Filed certified copy of order from CCA-5 extending the time for filing the court reporter's transcript of trial proceedings to and including September 19, 1973.

9-13 Filed Electronic Recording of Sentence; Defts. 1, 4, 5; Record #213.

9-13 Filed Electronic Recording of Plea and Sentence; Deft. 2; Record #213.

9-14 Record on appeal forwarded to CCA5.

10-11 Filed Defendant Mitchell Miller's Motion to Supplement the Record.

10-11 Filed Order of Judge Wilbur D. Owens, Jr., for the Clerk to certify the petit jury list dated May 7, 1973, from which the jury was chosen to try this case, and forward it to the Clerk of CCA-5 as part of the record on appeal in this case.

10-19 Filed Designation of Supplemental Record by defendant Mitchell Miller.

10-19 Supplemental record on appeal mailed to CCA5.

1974

10-17 Filed Mandate from CCA-5 affirming in part and reversing in part the judgment of the District Court, as to Susan McDuffie Weeks and John Henry McDuffie only.

10-17 Filed Order of Judge Wilbur D. Owens thereon making the judgment of CCA-5 the judgment of this Court.

DATE	PROCEEDINGS

10-18 Filed Mandate (certified amended judgment) of CCA-5 affirming in part and reversing in part, remanding to District Court for further proceedings, as to Susan McDuffie Weeks only, with order thereon of Judge Wilbur D. Owens, Jr., making the Mandate the order and judgment of the District Court.

10-18 Filed Order of Judge Wilbur D. Owens, Jr., vacating his order of October 17, 1974, on Mandate issued October 15, 1974.

11-15 Filed Transcript of Testimony of Defendant, Mitchell Miller, April 23-27, 1973.

IN THE
DISTRICT COURT FOR THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Criminal No. 9035

Violation: 18 USC § 371, in
connection with Internal
Revenue Liquor Laws

UNITED STATES OF AMERICA

vs.

MITCHELL MILLER
JOSEPH KENNETH BROOKS
TERRY LEE SMITH
SUSAN McDUFFIE WEEKS
JOHN HENRY McDUFFIE

THE GRAND JURY CHARGES:

COUNT ONE

That beginning on or about October 5, 1972, to and including on or about January 9, 1973, in the Middle District of Georgia and within the jurisdiction of this court and at other places to the Grand Jurors unknown, MITCHELL MILLER, JOSEPH KENNETH BROOKS, TERRY LEE SMITH, SUSAN McDUFFIE WEEKS and JOHN HENRY McDUFFIE, who are designated herein as defendants, did unlawfully, wilfully, knowingly, feloniously and fraudulently combine, conspire, confederate and agree and have a tacit understanding with each other and with various other persons to the Grand Jurors unknown, in violation of Section 371 of Title 18, United States Code, to defraud the United States by manufacturing, distilling, possessing, transporting, removing, depositing and concealing distilled spirits on which a tax had not been paid with the in-

tent to defraud the United States of said tax, and to commit certain offenses against the laws of the United States pertaining to the illicit, unlawful and fraudulent manufacture, possession, transportation and distribution of distilled spirits, to wit:

(a) To unlawfully, wilfully and knowingly have in their possession and custody and under their control certain stills and distilling apparatus used and intended to be used for the distillation of distilled spirits set up without having the same registered as required by law, in violation of Section 5601(a)(1), Title 26, United States Code.

(b) To unlawfully, wilfully and knowingly remove, deposit and conceal a certain commodity for and in respect whereof a tax was imposed by the laws of the United States of America and which tax had not been paid, to wit: certain quantities of distilled spirits, the exact quantities being to the Grand Jurors unknown, with the intention to evade collection by the United States of America of the tax imposed on such spirits, in violation of Section 7206(4), Title 26, United States Code.

(c) To unlawfully, wilfully and knowingly engage in and carry on the business of distillers of spiritous liquors without having given bond as required by law, in violation of Section 5601(a)(4), Title 26, United States Code.

That is to say, it was the plan and purpose of said conspiracy that the said defendants and co-conspirators would and did violate the aforesaid statutes in the Middle District of Georgia on or about the dates as follows:

(a) That they did unlawfully, knowingly and wilfully have in their possession and custody and under their control unregistered stills and distilling apparatus in Houston County, in the Middle District of Georgia, on or about January 9, 1973, and prior thereto.

(b) That they did at the unregistered distillery described in the preceding paragraph of this indictment unlawfully, wilfully and knowingly engage in and carry on the business of distillers without having given bond as required by law.

(c) That they did unlawfully, knowingly and wilfully possess, remove and conceal nontaxpaid distilled spirits produced at the unregistered distillery referred to in the immediately preceding two paragraphs of this indictment in Houston County, in the Middle District of Georgia, on or about January 9, 1973, 175 gallons, more or less, and at other times and places and amounts unknown to the Grand Jurors.

And the Grand Jury further charges that having so conspired, combined, confederated and agreed, said defendants and co-conspirators, in furtherance of said conspiracy and to effect the objects and purposes thereof, did commit numerous overt acts, among which are the following, on or about the dates alleged, to wit:

1. From on or about October 5, 1972, to on or about October 23, 1972, MITCHELL MILLER called Walter Puhan in Ballwin, Missouri, and arranged for the rental of a warehouse at Kathleen, Georgia, for an agreed rental of $300.00 per month with a three months lease. Said lease was allegedly for an electronics company called Trans Aero Corporation.

2. On October 24, 1972, SUSAN McDUFFIE WEEKS rented a post office box at the Kathleen, Georgia, Post Office in the name of Trans Aero Corporation.

3. On October 24, 1972, SUSAN McDUFFIE WEEKS made arrangements with Flint Electric Company in Warner Robins, Georgia, to have the electricity turned on at the Kathleen, Georgia, warehouse in the name of Trans Aero Corporation.

4. On October 24, 1972, MITCHELL MILLER and another white male subject visited the warehouse property in Kathleen, Georgia, in a white panel truck, at which time MITCHELL MILLER stated to the former caretaker of the warehouse, "We've got new locks and new chains, and we're going to a put a sentry dog inside."

5. From on or about October 25, 1972, to on or about November 22, 1972, MITCHELL MILLER rented a green and white 1970 Chevrolet one and one-half ton van-type truck belonging to E-Z Haul National Car Rental

from K.B. Service Station, 4509 Houston Avenue, Macon, Georgia.

6. On October 26, 1972, MITCHELL MILLER purchased 16 sheets of 18 gauge 3-feet by 10-feet sheet metal from Taylor Iron Works, Macon, Georgia.

7. On November 1, 1972, MITCHELL MILLER purchased antennas and connections for two mobile radio units and two base station radios from Specialty Distributing Company, 539 Arch Street, Macon, Georgia. Said items were received and signed for by SUSAN McDUFFIE WEEKS.

8. On November 11, 1972, MITCHELL MILLER purchased a quantity of sheet metal approximately 5-feet by 13-feet and metal pipe from Macon Iron and Paper Stock Company, Lower Poplar Street, Macon, Georgia. MITCHELL MILLER loaded these items onto a van-type rental truck.

9. On November 22, 1972, MITCHELL MILLER purchased a 1968 GMC van-type truck, blue in color, with lettering on the side indicating that it had previously been owned by Pepsico Truck Rental. MITCHELL MILLER purchased this truck from Dixie Truck and Parts Company, 5201 Houston Road, Macon, Georgia, and indicated the purchase was for Trans Aero Corporation, Suite 801, First National Bank Tower, Atlanta, Georgia.

10. On December 17, 1972, JOSEPH KENNETH BROOKS and TERRY LEE SMITH possessed a Pepsico Rental van-type truck bearing a 1972 Florida license 1C/V5032. Contained in this truck was an 8-foot long, shotgun type condenser, metal still cap, 150 five-gallon plastic jugs and 10 one-hundred pound butane gas bottles.

11. On December 19, 1972, MITCHELL MILLER called Walter Puhan in Ballwin, Missouri, and made arrangements to continue the rental of the warehouse property at Kathleen, Georgia, for three to six additional months by the Trans Aero Corporation, P.O. Box 312, Kathleen, Georgia.

COUNT TWO

The Grand Jury further charges that on or about January 9, 1973, in the Macon Division of the Middle District of Georgia and within the jurisdiction of this court, MITCHELL MILLER, JOSEPH KENNETH BROOKS, TERRY LEE SMITH and JOHN HENRY McDUFFIE did unlawfully, wilfully and knowingly have in their possession and custody and under their control a still and distilling apparatus set up without having the same registered as required by law, in violation of Sections 5179(a) and 5601(a)(1) of Title 26, United States Code.

COUNT THREE

That on or about January 9, 1973, in the Macon Division of the Middle District of Georgia and within the jurisdiction of this court, MITCHELL MILLER, JOSEPH KENNETH BROOKS, TERRY LEE SMITH and JOHN HENRY McDUFFIE did unlawfully, wilfully and knowingly carry on the business of distillers of distilled spirits without having given bond as required by law, in violation of Section 5601(a)(4) of Title 26, United States Code.

COUNT FOUR

That on or about January 9, 1973, in the Macon Division of the Middle District of Georgia and within the jurisdiction of this court, MITCHELL MILLER, JOSEPH KENNETH BROOKS, TERRY LEE SMITH and JOHN HENRY McDUFFIE engaged in and carried on the business of distillers of spiritous liquors with intent to defraud the United States of the tax imposed thereon, in violation of Section 5602 of Title 26, United States Code.

COUNT FIVE

That on or about January 9, 1973, in the Macon Division of the Middle District of Georgia and within the jurisdiction of this court, MITCHELL MILLER, JOSEPH KENNETH BROOKS, TERRY LEE SMITH

and JOHN HENRY McDUFFIE did unlawfully, wilfully and knowingly possess certain distilled spirits, to wit: 175 gallons, more or less, without the immediate containers thereof having affixed thereto a stamp as required by law, in violation of Sections 5205(a)(2) and 5604 (a)(1) of Title 26, United States Code.

A TRUE BILL.

_____

Foreman of the Grand Jury

_____

Assistant U.S. Attorney

MAXIMUM PENALTY:

$10,000, 5 years or both on each of Counts 1, 2, 3, 4 and 5.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Criminal No. 9035

Viol.: 18 USC & 371 I/C/W
Internal Revenue Liquor Laws

UNITED STATES OF AMERICA

vs.

MITCHELL MILLER
JOSEPH KENNETH BROOKS
TERRY LEE SMITH
SUSAN McDUFFIE WEEKS
JOHN HENRY McDUFFIE

MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

Comes Now, the Defendant, MITCHELL MILLER, the above captioned case, by and through his attorney, and moves the Court to suppress certain alleged evidence in the above case and respectfully shows the Court the following facts:

1.

The above captioned case is pending in this Court by virtue of an indictment of five counts against the named Defendant, MITCHELL MILLER, alleging conspiracy and substantive violations of the Internal Revenue Laws relating to illicit whisky.

2.

On or about January 23, 1973, agents of the Governments Alcohol, Tobacco & Firearms Unit presented to Mr. Barry Jones, President of Citizens and Southern National Bank, Warner Robins, Georgia, a copy of a pur-

ported grand jury subpoena duces tecum from this Court, a copy of which is attached as Exhibit "A".

3.

On or about the same date, agents of the Governments Alcohol, Tobacco & Firearms Unit presented to Harold Peavey, President of the Bank of Bryon, Bryon, Georgia, a similar grand jury subpoena duces tecum, a copy of which is attached as Exhibit "B".

4.

Both subpoenas required the respective Presidents to produce:

> "all records of accounts, i.e. savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date

and that said production should be made on January 24, 1973 at 9:00 o'clock, A.M. to a Federal Grand Jury for this District.

5.

Within several days after service of the attached subpoenas, the banks made available to the Alcohol, Tobacco & Firearms agents certain original documents and microfilm copies of documents pertaining to the defendant, MITCHELL MILLER'S, transactions with the banks including but not limited to confidential financial statements supplied to the banks, personal checks paid by the banks through Defendant's accounts, personal checks deposited to the banks, deposit slips, and other information, the full extent of which is not known at this time to the Defendant.

6.

The Defendant states and believes that certain original and microfilm copies of his personal and business checks may be used as evidence in the above captioned case as well as other information supplied and further that said

information provided Alcohol, Tobacco & Firearms agents with additional investigative leads.

7.

After these documents and copies thereof were supplied to Alcohol, Tobacco & Firearms agents, they were not required to appear for the alleged Grand Jury session on January 24, 1973.

8.

Defendant states and believes that the records of this Court will show that there was in fact no grand jury in session on or about January 24, 1973, but that the next grand jury that did in fact convene was on or about February 12, 1973 for approximately three days.

9.

Defendant further states and believes that the attached exhibits represents an unreasonable, unlawful and illegal abuse of the process of this Court in order to seize alleged evidence of crime and other private documents and memoranda that could not otherwise be seized except through lawful processes of the Courts, through judicial summons or warrants for search and seizure.

10.

Said documents and copies thereof were unlawfully seized by agents of the Government without legal process of this Court, a summons or a search warrant and, therefore, violate the Defendant's constitutional right to privacy and his rights guaranteed under the Fourth Amendment of the Constitution of the United States of America.

11.

The Defendant further states that Exhibits attached hereto are unreasonably broad, vague and nonspecific as to the items sought and for this reason violate the Fourth Amendment of the Constitution of the United States.

12.

The Defendant, MITCHELL MILLER, further states that he has given no consent to the release of any of said documents seized as above described nor for the microfilming by said banks of any of the checks drawn upon his accounts or accounts on which he can draw.

13.

Some of the copies of checks and documents seized by the agents of the Government are required to be kept by certain financial institutions including FDIC banks for reporting purposes to the Secretary of the Treasurer of the United States under act of Congress which has been declared unconstitutional as violative of the citizenry's constitutional rights to privacy and rights guaranteed under the Fourth Amendment of the Constitution of the United States.

14.

The Defendant, MITCHELL MILLER, respectfully moves the Court to suppress all such documentary evidence secured as described above and all other evidence derived from these illegal seizures as violative of his right to privacy and his Fourth Amendment rights or alternatively to exercise the Court's inherent supervisory authority and suppress the evidence seized without lawful process and in the manner set forth above.

WHEREFORE, Defendant, MITCHELL MILLER, prays that any and all of these documents, copies of documents, and other items, memoranda and information derived pursuant to these subpoenas and any other subpoenas issued to any financial institution, unknown to him which he has dealt within the past year be suppressed and that any other evidence derived or brought

forth from the seizure of said documentary evidence be suppressed in any future trial of the above case.

By: _____
D. L. RAMPEY, JR.
Attorney for Defendant,
Mitchell Miller

Nunn, Geiger, Rampey, Buice & Harrington
P.O. Box 520
Warner Robins, Georgia 31093

CERTIFICATE OF SERVICE

This is to certify I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This ——— day of ————————, 19——.

_____
Attorney for

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

No.

UNITED STATES OF AMERICA

v.

GRAND JURY

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

To Harold Peavy, President, Bank of Byron, Byron, Ga.

You are hereby commanded to appear in the United States District Court for the Middle District of Georgia at U.S. Courtrooms in the city of Macon on the 24th day of January 1973 at 9:00 o'clock A.M. to testify in the case of United States v. Grand Jury and bring with you all records of accounts, *i.e.* savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date.

This subpoena is issued upon application of the[1] United States.

Jan. 22, 1973.

RONALD T. KNIGHT
Attorney for United States
P.O. Box U, Macon, Ga.

_____
Clerk.

By _____
Deputy Clerk.

[1] Insert "United States," or "defendant" as the case may be.

RETURN

Received this subpoena at on
and on at
served it on the within named
by delivering a copy to and tendering to
the fee for one day's attendance and the
mileage allowed by law.[2]

Dated:

_____, 19——

Service Fees
Travel ——— $
Services ———
———
total ——— $

_____
By _____

[2] Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b), Federal Rules Criminal Procedure).

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

No.

UNITED STATES OF AMERICA

v.

GRAND JURY

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

To Barry Jones, President, C&S National Bank, Warner Robins, Ga.

You are hereby commanded to appear in the United States District Court for the Middle District of Georgia at U.S. Courtrooms in the city of Macon on the 24th day of January 1973 at 9:00 o'clock A.M. to testify in the case of United States v. Grand Jury and bring with you all records of accounts, *i.e.* savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date.

This subpoena is issued upon application of the [1] United States.

Jan. 23, 1973.

RONALD T. KNIGHT
Attorney for United States
P.O. Box U, Macon, Ga.

/s/ J. P. Cowart,
Clerk.

By _____
Deputy Clerk.

[1] Insert "United States," or "defendant" as the case may be.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
STATE OF GEORGIA

Criminal No. 9035

Viol.: 18 USC & 371 I/C/W
Internal Revenue Liquor Laws

UNITED STATES OF AMERICA

vs.

MITCHELL MILLER
JOSEPH KENNETH BROOKS
TERRY LEE SMITH
SUSAN MCDUFFIE WEEKS
JOHN HENRY MCDUFFIE

STIPULATION OF FACTS AND TESTIMONY

Comes Now, the United States of America, by and through its attorney, Mr. William J. Schloth, United States Attorney for the Middle District of Georgia or by one of his Assistants and the Defendant, MITCHELL Miller, by and through his attorney and stipulates and agrees that if Mr. Barry Jones, President, C&S Bank of Warner Robins. Georgia were called to testify in behalf of the Defendant, MITCHELL MILLER, on his Motion to Suppress Documentary Evidence secured from the bank by ATF Agents he would testify that:

1.

He is President of C&S Bank of Warner Robins, Georgia.

2.

That on or about January 23, 1973, Alcohol, Tobacco and Firearm Unit Agent served Mr. Barry Jones with a

Grand Jury Subpoena Duces Tecum from this Court, a copy of which is attached as Exhibit "A".

3.

That in compliance with the Subpoena, he ordered his Operations Officer and other employees of the bank to make available original bank records, microfilm records of the accounts of Mr. Mitchell Miller and also to provide said agents with copies of whatever documents they desired.

4.

After the said Barry Jones, President of C&S Bank of Warner Robins, Georgia was served with the Subpoena, he did not advise MITCHELL MILLER that a Subpoena for records relating to his accounts has been served on the bank prior to the records being given over to the ATF Agents.

5.

His Operations Officer a day or two later supplied the agents with copies of checks drawn on Defendant MILLER'S (Mr. Mitchell Miller, 1000 Executive Court, Warner Robins, Georgia 31093, Account No. 100-57-024) account, including microfilm copies of checks, as well as deposit slips, a financial statement and other documents, the extent of which is not known to his personally.

6.

Thereafter, he was advised that it would not be necessary for him to appear at the Grand Jury Session on January 24, 1973.

7.

Since August, 1972, his bank has been keeping microfilm copies of the customers accounts as well as personal checks paid through the customers account in compliance with Treasury and Banking Regulations issued under the Banks Secrecy Act.

The United States of America and Defendant, MITCHELL MILLER, agree and stipulate that this may be

used by the Court in considering the Defendant MILLER'S Motion to Suppress Certain Bank Records as if Mr. Barry Jones had been present and testified in the hearing on said Motion.

Dated this 18th day of April, 1973.

Stipulated and agreed to:

WILLIAM J. SCHLOTH
United States Attorney

By: _____
Assistant U.S. Attorney

/s/ D. L. Rampey, Jr.
D. L. RAMPEY, JR.
Attorney for Defendant
Miller

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

No.

UNITED STATES OF AMERICA

v.

GRAND JURY

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

To Barry Jones, President, C&S National Bank, Warner Robins, Ga.

You are hereby commanded to appear in the United States District Court for the Middle District of Georgia at U. S. Courtrooms in the city of Macon on the 24th day of January 1973 at 9:00 o'clock A.M. to testify in the case of United States v. GRAND JURY and bring with you all records of accounts, *i.e.* savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date.

This subpoena is issued upon application of the[1] United States.

Jan. 23, 1973

Ronald T. Knight
Attorney for United States
P. O. Box U, Macon, Ga.
Address

/s/ J. P. Cowart
Clerk

By _____
Deputy Clerk

[1] Insert "United States," or "defendant" as the case may be.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
STATE OF GEORGIA

Criminal No. 9035

Viol.: 18 USC & 371 I/C/W
Internal Revenue Liquor Laws

UNITED STATES OF AMERICA

vs.

MITCHELL MILLER
JOSEPH KENNETH BROOKS
TERRY LEE SMITH
SUSAN MCDUFFIE WEEKS
JOHN HENRY MCDUFFIE

STIPULATION OF FACT AND TESTIMONY

Comes Now, the United States of America, by and through its attorney, MR. WILLIAM J. SCHLOTH, United States Attorney for the Middle District of Georgia or by one of his Assistants and the Defendant, MITCHELL MILLER, by and through his attorney and stipulates and agrees that if Mr. Harold Peavy, President, Bank of Byron, Byron, Georgia were called to testify in behalf of the Defendant, MITCHELL MILLER, on his Motion to Suppress Certain Documentary Evidence secured from the bank by ATF Agents he would testify that:

1.

He is the President of the Bank of Byron, of Byron, Georgia.

2.

That on or about January 23, 1973 Alcohol, Tobacco and Firearm Unit Agent served Mr. Harold Peavy with

a Grand Jury Subpoena Duces Tecum from this Court, a copy of which is attached as Exhibit "A".

3.

That in compliance with the Subpoena, he ordered employees of the bank to make available original bank records, microfilm records of the accounts of Mr. Mitchell Miller and also to provide said agents with copies of whatever documents they desired.

4.

After the said Harold Peavey, President of Bank of Byron, Byron, Georgia was served with the Subpoena, he did not advise MITCHELL MILLER that a Subpoena for records relating to his accounts had been served on the bank prior to the records being given over to the ATF Agents.

5.

Employees of his bank, in conjunction with ATF Agents inspected microfilm of checks drawn on the account of Mrs. Minnie Lyn Miller, 3859 Mathis Street, Macon, Georgia 31206, Account No. 100-08-043, on which account MITCHELL MILLER is allowed to drawn checks and supplied ATF Agents with copies of checks drawn by the Defendant, MILLER, as well as deposit slips and other documents, the extent of which is not fully known to him.

6.

Thereafter, he was advised that it would not be necessary for him to appear at the Grand Jury Session on January 24, 1973.

7.

The Bank of Byron keeps microfilm copies of customers accounts including personal checks paid through the accounts in compliance with Treasury and Banking Regulations issued under the Banks Secrecy Act.

The United States of America and Defendant, MITCHELL MILLER, agree and stipulate that this may be used

by the Court in considering the Defendant MILLER'S Motion to Suppress Certain Bank Records as if Mr. Harold Peavey had been present and testified in the hearing on said Motion.

Dated this —— day of ————, 1973.

Stipulated and agreed to:

WILLIAM J. SCHLOTH
United States Attorney

By: _____
Assistant U. S. Attorney

_____
D. L. RAMPEY, JR.
Attorney for Defendant Miller

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

No.

UNITED STATES OF AMERICA

v.

GRAND JURY

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

To Harold Peavy, President, Bank of Byron, Byron, Ga.

You are hereby commanded to appear in the United States District Court for the Middle District of Georgia at U. S. Courtrooms in the city of Macon on the 24th day of January 1973 at 9:00 o'clock A.M. to testify in the case of United States v. GRAND JURY and bring with you all records of accounts, *i.e.* savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date.

This subpoena is issued upon application of the [1] United States.

Jan. 22, 1973

Ronald T. Knight
Attorney for United States
P. O. Box U, Macon, Ga.
Address

_____
Clerk

By _____
Deputy Clerk

[1] Insert "United States," or "defendant" as the case may be.

RETURN

Received this subpoena at _____ on _____ and on _____ at _____ _____ served it on the within named _____ _____ by delivering a copy to _____ and tendering to _____ the fee for one day's attendance and the mileage allowed by law.[2]

Dated:

_____

By _____

_____, 19____

Service Fees
Travel _____$
Services _____

Total _____$_____

[2] Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b), Federal Rules Criminal Procedure).

[Supplemental Transcript]

* * * *

[17] THE COURT: All right. If you can't the Court would have the responsibility of doing that.

All right, that leaves us with the *motion to suppress.* Now, is there any part of those motions to suppress that is not common to the entire case?

MR. LARSEN: I haven't had the opportunity to read the other motions, Your Honor, but I believe there is one [18] motion to suppress as to one matter that I did not file a motion on.

THE COURT: The bank statements would be the one you are referring to?

MR. RAMPEY: I believe so, Your Honor.

THE COURT: But other than the bank statements do we have any other phase of this that seems peculiar to just one defendant?

MR. LARSEN: I believe Mr. Rampey has a motion as to the still. My motion relates only to what was found in Dodge County.

THE COURT: Well, let's look.

MR. MANN: Of course, all of them are common to our interests, I would think.

THE COURT: Well, it being a conspiracy charge it has to be. Now, on the bank records, do you desire to discuss that any further, Mr. Rampey? It's not really necessary to have an evidentiary hearing on that motion is it?

MR. RAMPEY: I think it is, Your Honor.

THE COURT: Isn't that a question of law purely?

MR. RAMPEY: I don't think it is, Your Honor. I followed the Court's suggestion yesterday and Mr. Knight and I have agreed on a stipulation of some testimony in regard to the bank president. I want and desire very much to find out what records were given to the Alcohol, Tobacco and Firearms agent in response to these subpoenas because apparently neither the [19] bank presidents nor these employees kept records of what they turned over. I feel like it's rather important to my client, number one, that we have a record in regard to what

they secured and at what point in the investigation they secure it, because I am raising some constitutional issues that are pending before the Supreme Court of the United States in a case in California in regard to whether or not the requirements, record keeping requirements and also the reporting requirements and other aspects of this particular act violate the defendant's constitutional right to be free from unreasonable searches and seizures.

THE COURT: Well, suppose we throw that over to the foot of the calendar since it is peculiar to your client and proceed with the remainder of the motions.

MR. RAMPEY: Yes sir, all right.

* * * *

[31] MR. ALMAND: The grand jury subpoena is about the only thing left, I think.

MR. RAMPEY: Yes sir. Your Honor, Mr. Knight and I have entered into two *stipulations of fact* in regard to the testimony of the two bank officers, Mr. Jones, president of the C & S at Warner Robins, and also Mr. Peavy of the Bank of Byron. Basically these are the same. We stipulate that these men are the presidents of these respective banks and that on or about January 23, 1973 the Alcohol, Tobacco & Firearms agent served each of them with a subpoena duces tecum to the grand jury, copy of which is attached to these, and I believe—I don't know [32] whether the Government has the originals or not. I don't believe they have been returned to the Clerk's office. I called and I don't believe they are in the Clerk's files but I handed copies, amended copies to my motion—

THE COURT: Well, the witness would have the originals.

MR. RAMPEY: I believe Mr. Powell may have the originals.

THE COURT: May I see your stipulation?

MR. ALMAND: If they don't have the originals we don't contest the copies.

THE COURT: Okay. I have read the stipulation.

MR. RAMPEY: All right. I have two bank employees, one from each bank who assisted the agent in getting these records in response to this subpoena, and I would like to call them for some short testimony, if it please the Court.

THE COURT: All right sir.

MRS. MARGARET BEDSOLE, being called by the Movants, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RAMPEY:

Q Would you state your full name, please, and where you are employed.

A Margaret Bedsole, C. & S Bank, Warner Robins.

Q How long have you been employed there?

A Twelve and a half years.

[33] Q Has that bank ever been known by a different name?

A It was formerly the Bank of Warner Robins.

Q Now, I'll ask you if in January of this year you were called upon by your president to assist some Alcohol, Tobacco & Firearms agents in getting some documentary evidence together off of your microfilm and out of your bank records?

A Yes, I was.

Q Do you recall approximately when that was, or specifically when?

A Not without looking at the date. I don't remember exactly what date they came to our bank.

THE COURT: Well, the date is in your stipulation.

MR. RAMPEY: Yes sir.

Q Well, that was in January. Is that correct?

A I'm not sure. It was passed on to me from Mr. Jones, the subpoena.

Q Did you work from that subpoena to get together the records?

A Yes.

Q Do you have the copy of that subpoena that was served?

A Yes.

Q I wonder if you could refresh your recollection from that.

THE COURT: No question about the date, is there? [34] Isn't it immaterial to worry about the date?

Q Well, let me ask you this. Maybe I can get a little quicker to the point I'm leading up to. How long did it take you to get together the documentary evidence to give to—do you know who the agents were that were there?

THE COURT: Do you want her to tell you how long first, or who the agents were?

Q Who were the agents, do you know?

A I don't know both their names, no.

Q Do you see any of them in court?

A One is right there.

MR. RAMPEY: Can the record indicate she is pointing to Mr. Powell?

THE COURT: Yes, sir.

Q How long did you work with them in putting together these records?

A Well, after it was passed on to me we worked probably about four or five hours getting together what they asked for.

Q What did they ask for?

A All financial records of Mitch Miller that we had in the bank from October 1 to January 9.

Q Do you know what you turned over to them, what it consisted of?

A We gave them a copy of the financial statement of Mr. Mitch Miller, the most current one.

[35] Q What date? Do you have any way of identifying that?

A I have a copy of it, yes. It's October '69.

Q What else did you supply to them?

A We gave them a copy of his bank statement, the checks on the statements and the deposit slips, copies of all this information.

Q The checks? Now what do you mean by that?

A The checks that he had written on his account and that had been paid on his account at our bank.

Q How did you go about getting copies of those?

A From our microfilm records that we have stored within the bank.

Q Now when did you start microfilming personal checks that flow through an individual account like this particular account?

A In August of '72 we started microfilming all our records. Prior to that everything was not microfilmed.

Q What about a check that I have in my—I have my account there and I write checks there, are every one of my personal checks on your microfilm now?

A Yes.

Q Prior to August of '72 are my checks back then on microfilm?

A All of them would not be. Some of them would be, depending on how we got them in, from what channel they came to our bank.

[36] Q Do you have any knowledge of why you changed your procedures in August of 1972?

A Because of a new law that we were being required to keep a record of everything on our permanent microfilm file.

Q How do you go about locating these particular checks?

A Well, now every check that is drawn on one of our customers' accounts is microfilmed by account number order and this is since last August that this has been done.

Q What happens to the original checks?

A They are mailed out to the customer.

Q Has that been customary in the banking business? Do you know?

A Yes.

Q Okay. Now are each of these checks from each account on a separate microfilm or how are they digested?

A No. Each day's work is on a separate microfilm roll. It is done by date. Each day's work is microfilmed all at one time on the same roll of film.

Q How did you go about locating the checks for this time period asked for in the subpoena?

A We took a copy of the bank statement, got the dates that we had paid checks on his account, went to those dates, microfilm and then by account number located these items.

Q Did you have to look at other peoples' checks to find the particular check you were looking for?

A Yes. Every customers' work of that day is on the same roll of film.

[37] Q And could you give us some idea of number of customers' checks or individual customers' checks that might be one days work of microfilm?

A No, I could not give an accurate number.

Q Well, how many customers do you have at the C & S Bank?

A We have better than 8,000 checking accounts.

Q Are those personal and business or just all your checking accounts?

A Yes.

Q And all of those are being reduced in the manner that you have described?

A Right.

Q And you supplied to Mr. Powell or another agent all of Mr. Miller's checks for these months in the subpoena?

A Yes, for the time period asked for we gave them to them.

Q What about deposit slips?

A There were copies of the deposit slips on the deposits that had been made to the Mitch Miller account.

Q What about ledger cards and copies of statements and items such as that?

A The copy of the statement was given to them.

Q Now this microfilming of these personal checks is this a microfilm of just the front of the check?

[38] A No, we have front and back, shows all endorsements.

Q Okay. I believe those are all the questions.

MR. ALMAND: We have no questions, Your Honor.

BY THE COURT:

Q I would like to ask, you said that before the change of the law that your records were microfilmed but differently?

A That's right.

Q In what manner were they microfilmed before the law was changed?

A The ones—the checks—well, all items that came into our bank, across our counter, that were handled in our bank that day were microfilmed, but in no order, just in the order they came in to us, and we have cash letters coming from the Federal Reserve Bank that come directly to Macon to be paid on our account at the computer in Macon, and they did not come to our bank to be mocrofilmed before they went to the computer.

Q As a matter of banking practice they were microfilmed somewhere along the way?

A Yes, somewhere along the way.

BY MR. RAMPEY:

Q Well, if they were microfilmed somewhere along the way, did you say they were microfilmed at the computer when they were sent to the C & S in Macon?

[39] A I do not know if Macon microfilmed them before they paid these items or not, but the bank that the items would originate at would be where they had been microfilmed, which could be the Federal Reserve or any place.

Q Before August 1972, if I wrote a check and it was payable to Sears Roebuck up here in Macon, and it came back out there would you have a microfilm copy of that?

A No. This would have been probably deposited in Macon, go directly to the computer here in Macon, and then be forwarded to us the following morning for final payment of the item.

Q All right, thank you.

MR. ALMAND: No questions.

MRS. NONA ELIZABETH JONES, being called by the Movants, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RAMPEY:

Q Would you state your name?

A Nona Elizabeth Jones.

Q Where are you employed?

A Bank of Byron.

Q How long have you been there?

A A year, April 10.

Q Were you employed there in January of this year?

A Yes.

[40] Q Did you have occasion during that month to work with some agents of the Treasury Department, Alcohol, Tobacco & Firearms, and look up some checks for them?

A Yes, I did.

Q Do you know who those agents were?

A I don't remember the names.

Q Have you seen any of them today?

A Yes, one.

Q Do you see him now?

A Yes sir.

Q Are you looking at Mr. Powell? Can we let the record state she is identifying Mr. Powell?

THE COURT: Yes sir.

Q All right. Now what were you asked to provide to them?

A The checks on account of Mrs. Minnie Lynn Miller to October—from October through January.

Q And is Mrs. Miller the only person who can sign or draw checks on this account?

A No.

Q Who else can draw checks on that account?

A Mr. Mitch Miller.

Q How did you go about providing them with the checks that they asked for? Were they looking for a particular check?

A Not to my knowledge.

[41] Q How did you go about showing them these checks or copies of them?

A We have a Recordak machine. All of our work is kept on microfilm.

Q And they were not asking for specific checks?

A No sir.

Q How did you go about showing them Mr. Miller's checks, or Mrs. Miller's checks.

A Our work is on microfilm and we have a Recordak film machine that shows a picture of the checks, front and back.

Q Did you operate the machine as they looked at the checks?

A Yes.

Q Did you provide them with any of the checks?

A Two copies.

Q You know which checks you gave over to them?

A I only remember one check.

Q What was that?

A K & B Service Station.

Q But do you recall more than one check being provided?

A Yes sir, it was two checks, I think.

Q Now were any other records of the bank made available pursuant—at the time you worked with them?

A Not to my knowledge. That was all they asked for.

Q What about deposit slips?

[42] A Checks and deposits are all on the same film.

Q I see. Okay. And they picked out particular checks as you worked the machine for them. Is that correct?

A Yes sir.

MR. ALMAND: No questions.

MR. ROBERT L. POWELL, being called by the Movants, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RAMPEY:

Q State your full name please and where you are employed?

A Robert L. Powell, Bureau of Alcohol, Tobacco & Firearms, U.S. Treasury Department.

Q And you were so employed in January of this year?

A That's right.

Q I'll ask you to state whether or not in January you served some subpoenas on the presidents of the C & S Bank of Warner Robins and the Bank of Byron?

A Yes sir.

Q Do you have your copies or the originals of those?

A I have the original copy of the subpoena.

Q Have you made a return on those yet?

A I have filled in the information, yes.

Q Do you know when those were served on the [43] respective officers out there?

A Yes, on the Bank of Byron that subpeona was served on Jan. 22, 1973, and on the C & S Bank of Warner Robins on Jan. 23, 1973.

Q Now, did you receive anything from those banks pursuant to those subpeonas?

A Yes, sir, I did.

Q Now in regard to the C & S Bank of Warner Robins do you have a record of what you received from them?

A Well, I have the checks that I received from them or the paper work that I received from them.

Q Do you have all of that that you received?

A Yes.

Q What about the Bank of Byron?

A I have all that I received from them too, yes.

Q And I believe the Bank of Byron was the lesser number of documents. Is that correct.

A I'm sure of one check and one deposit slip. There may have been one other check; either two or three items. I have those at my office.

Q You do not have them here today?

A I have most everything. The thing I'm not sure about is that third item from the Bank of Byron.

MR. RAMPEY: Just trying to figure some way, Your Honor, to at least get in the record what he actually received.

[44] THE COURT: I don't think you are necessarily entitled to that, sir. You might cover the subject matter but you are not presently entitled to have the evidence laid on the table, as far as I know.

MR. RAMPEY: Well, Your Honor, I don't—if the evidence we are alleging was seized and—

THE COURT: Yes sir, but you are not entitled to see the evidence. This is a hearing on a motion to suppress. It's not a fishing expedition.

MR. RAMPEY: Well, I would like to have the records to show what documents he received. Even if I don't physically see them today I would like to be able to have the record perfected so that if in the future this particular law I'm traveling under is held unconstitutional I'll know what items were received.

THE COURT: Well, if the Government is permitted to use the evidence then upon the trial of the case that will come out and it will all be documented and identified.

MR. RAMPEY: But they may not necessarily use all of the evidence.

THE COURT: So then you have nothing to complain about.

MR. RAMPEY: But they may have used investigative leads from evidence that they received out there that may have been illegally seized.

THE COURT: Well, let's skip over that for the moment. You convince the Court that it ought to be suppressed.

[45] MR. RAMPEY: Can I ask him about the categories of materials that he received?

THE COURT: Yes sir.

Q Can you tell me what you received, without detailing the information?

A At the Bank of Byron we received one deposit slip and one or two checks. At the C & S Bank of Warner Robins we received numerous checks, copies of checks, deposit slips and two financial statements. We

also received from the C & S Bank three monthly statements which list all of the checks for that period.

Q And to your knowledge did you receive copies of all of Mr. Miller's checks for this period specified in the grand jury subpoena?

A Mrs. Bedsole said that there were one or two checks on microfilm that wouldn't print.

Q Wouldn't print?

A Wouldn't print. They couldn't get a good copy of those, so excluding those, as far as I know, we got them all.

Q So far as you know you got full disclosure under your subpoena at the C & S Bank?

A That's correct.

Q For the period specified. Now at the Bank of Byron, did you just look at the microfilm and look at all of the checks or secure all of the documents that you asked for?

A We just looked at the microfilm and made copies of what I have related, deposit slip and one or two checks.

[46] Q All right. Now, in this regard, let me ask you whether or not you used some of those checks to then, in your investigation—to further your investigation?

A Some of those checks have been used in the investigation, yes.

Q As investigative leads?

A Er—yes, probably so.

Q In other words they disclosed possible other transactions or overt acts that you didn't know about at the time you got the checks?

A In one or two instances, yes.

Q All right.

MR. RAMPEY: I don't think I can go any further on that according to the Court's prior ruling.

THE COURT: Well, it seems to the Court as a practical matter that you have covered the water front and that any item that came from one of the banks, if it later comes out in the chain of circumstances is obviously labeled as to the as to the deposit slip with

the name of the bank on it, or the name of the accounts that are in it, already in the evidence, so there is enough identification to protect you down the road it seems to the Court.

MR. RAMPEY: Let me say this. Suppose the ATF agent got a check out there for a transaction at a particular store for the purchase of some item, and he did not otherwise know about this particular transaction, so he goes to the store, based on the information he gets from the check, and interviews [47] the person about some item that may have been found at the still, raw materials or whatever. Well, at the trial of the case they probably will just put the witness on the stand and that will be it, and I wouldn't have any record right now or in the future in that regard. So I agree with the Court that if the checks do go in and they were made available during those times the record might be perfected, but not as to situations such as that.

THE COURT: Well, I will have the Government put every item that they got from the bank in an envelope and make it a part of the case, sealed.

MR. RAMPEY: All right sir.

THE COURT: And in the event your theories ever are supported by the Supreme Court of the United States they will be right there and we can order the envelope opened, if we ever get to that point.

MR. RAMPEY: All right sir. Well, that's true, and—er—

THE COURT: That will fully protect you, but at the same time I don't want to have a fishing expedition.

MR. RAMPEY: All right. For the purpose of the record, of my motion, I'll be satisfied if the Court will order the Government to either make a record or put those documents that were supplied in the record.

THE COURT: All right. The *Government is hereby ordered* forthwith to produce a copy of everything that they [48] got from the bank, turn it over to me, I'll inspect it and put it in a sealed envelope.

MR. ALMAND: May it please the Court, as to this, of course, the Government will be ready and willing to comply. I think we will have trouble making a copy

because I don't think they will be readable. The copies we have are almost illegible as it is.

THE COURT: All right. Just deliver everything you've got.

MR. ALMAND: Yes sir.

THE COURT: And it it's necessary to use it during the trial we will open it and pull it out of the envelope. And note from where it came. I want to protect your client fully.

MR. RAMPEY: Yes sir. That's the point I was trying to make. The checks may go into evidence and may not. They may have resulted in investigative leads.

Q And you received this document, these documents, pursuant to those subpoenas? Is that correct, Mr. Powell?

A Yes sir.

Q Did you have a search warrant or any other authority to get those documents from the bank?

A Just the subpoena.

Q And where did you get the subpoena from?

A From the United States Attorney's office.

Q Do you remember the individual you received it from?

[49] A Well, I received it from Mr. Knight's secretary.

Q And to your knowledge did a grand jury meet on Jan. 24?

A Not to my knowledge.

MR. RAMPEY: I believe that's all the questions I have.

MR. ALMAND: No questions, Your Honor.

THE COURT: Mr. Powell, you are an agent of the United States Government?

A Yes sir.

THE COURT: And of the Treasury Department, I believe. Is that correct?

A Yes sir.

THE COURT: I wanted to get his capacity into the record.

MR. RAMPEY: Yes sir. I wonder if we might be able to put those subpoenas in the record too, the originals or whatever he has.

THE COURT: Oh yes sir, give them to the Clerk. Anything else?

MR. RAMPEY: Like to ask the Court to take judicial notice of the records in this court that there was no grand jury meeting on January 24.

THE COURT: I couldn't tell you whether there was or wasn't, Gentlemen.

MR. RAMPEY: Well, I believe the records of the Court will reflect that—

[50] THE COURT: The record will reflect that there was a grand jury in existence that was empowered to meet at whatever time the Court called it. The record may further reflect that this Court regularly calls that grand jury into session from time to time and that the District Attorney is called upon to prepare for the calling of the grand jury and to prepare matters to be presented to it. That is a complete statement of the practice of this court.

MR. RAMPEY: Right, sir, but in this particular—

THE COURT: Now, whether or not the grand jury met or was to meet on that date, I couldn't tell you.

MR. RAMPEY: I believe the record in the Clerk's office would reflect that and I am asking the Court to take judicial notice of the records.

THE COURT: What do the records reflect, Gentlemen?

MR. ALMAND: I have checked and there was no actual meeting on the 24th.

MR. RAMPEY: They were called into session on February 12 according to information I received from Mrs. Motes. I think that was Tuesday afternoon of the big snow storm and that was the next time they were called into session, that was on February 12.

THE COURT: Well, I know the grand jury was supposed to meet that Monday. I recall that Monday myself, before the snow storm hit us. But you gentlemen can investigate that and [51] supplement it.

MR. RAMPEY: We might be able to stipulate the date when they physically came back in session.

THE COURT: Well, of course, they met at the call of the foreman. Did the foreman call a meeting originally for January 23 that ended up being held in February, or not? I don't know. Mr. Schloth can tell us.

MR. ALMAND: I think, Your Honor, a call was sent out to meet on the 20th. It was not held but the next actual call meeting in which they banded together was on the 12th or 13th. I think the snow storm was on the 12th and they actually met on the 13th, but the call was for the 12th of February.

THE COURT: There was no call on the date shown in this subpoena?

MR. ALMAND: No sir, not for the 24th.

THE COURT: It seems the Government agrees, sir.

MR. RAMPEY: All right sir. That's all.

MR. ALMAND: Nothing further for the Government.

THE COURT: Well, Gentlemen, there's only one thing the Court would observe. Of course, no court can rule on matters in a vacuum and neither side has presented the whole story about bank microfilm because this Judge knows as a matter of personal knowledge that banks for years had microfilmed checks, long before the secrecy act that has been referred to in your motion. In other words the process didn't start with the [52] secrecy act, is what I'm telling you.

MR. RAMPEY: I agree, Your Honor, but by the same testimony of Mrs. Bedsole there is one particular example of a bank that did not microfilm.

THE COURT: She didn't say that.

MR. RAMPEY: Yes sir, I believe she did.

THE COURT: You don't know what the arrangement is at the computer center and if you want to call a witness and perfect your record you might be in better shape.

MR. RAMSEY: But the point that I am making is that at C & S Bank of Warner Robins they did not microfilm each and every individual personal check as it was paid through an account. What she was saying was that as checks just floated in to the computer center at Denmark and Second they were microfilmed there and she could probably testify it would be extremely difficult to utilize that as an investigative tool in the manner in which they have done it here, and my argument—I'm getting ahead of myself.

THE COURT: And I'm saying your record is not complete if you are trying to make that point, if you are trying to go forward on that point.

MR. RAMPEY: On the point—

THE COURT: You haven't established what happened at the computer center. You are just assuming that those records were not microfilmed.

MR. RAMPEY: But she's saying that they microfilm right now for the months—for January and for the months in [53] question they microfilmed at C & S Bank. And by the same token I might add—and I was going to ask the Court to take judicial notice of the statutes in question requiring this microfilming—

THE COURT: Well, if they are statutes I don't have to take judicial notice of them.

MR. RAMPEY: All of which carry with them criminal and civil sanctions, and I don't see really whether it makes much difference that the Bank did do it previously or how they did it. The fact in the banking world is that every bank is required to microfilm the front and back of every personal check in every bank transaction, in every single item that is paid through there.

THE COURT: What I'm pointing out to you is that your contention is that but for that act those records wouldn't have been there and—

MR. RAMPEY: No. I'm talking about but for the act those records would not have been in this bank and in the manner that they were available here under this act.

THE COURT: I would suggest to you if you want to make a complete record that you get somebody from the FDIC, State Banking Department. I think you will discover that as a matter of banking practice banks were required to have microfilm facilities for years and years and years.

MR. RAMPEY: I think certain collection banks were but my point here is that this particular bank—I'm not trying to override totally the fact that some banks did or did not [54] microfilm. This particular bank did not microfilm in the order that—they had to start microfilm-

ing as of August '72. She did testify that the particular checks might have been available or apparently were reduced to microfilm at some phase of the proceeding—

THE COURT: Well, Mr. Rampey, it would appear that this officer had lawful authority to look at the records of this bank, and I invite you to cite any law to the contrary.

MR. RAMPEY: I don't have any at this time.

THE COURT: It appears to me, Gentlemen, that the records were not produced in response to a subpoena. The banker didn't come up and give—bring anything to the grand jury. He just gave them to the agent.

It would just appear for numerous reasons that the motion is not good, in the Court's judgment. If you want to furnish some authority on standing and on the status of bank records I'll be glad to reconsider the motion, but unless you do you may for the moment consider it overruled.

MR. RAMPEY: All rights sir.

* * * *

[Trial Transcript]

[350] MRS. W. S. BEDSOLE, being called by the Government, testified as follows:

DIRECT EXAMINATION

BY MR. KNIGHT:

Q Please state your full name for the record and by whom you are employed.

A Margaret Bedsole, Citizens & Southern Bank of Warner Robins.

Q And what is your title?

A Assistant Operations Officer.

Q In that capacity do you have access to microfilm and records kept by the bank?

A Yes.

Q And pursuant to a subpoena have you previously brought to this court certain records from the bank's microfilm?

A Yes.

Q And do you have with you the actual microfilm pertaining to those photo copies?

A Yes.

Q Would you hold them up so we can see them?

A (Witness complied.)

Q Did you personally supervise the making of the photo-copies from the microfilm that you have in your hand?

A Yes.

Q I hand you Govt. Ex. 45 and ask you if this is one of the photo-copies which you supervised making from the microfilm that you have shown us?

[351] A Yes, it is.

Q And that is a check on the Miller account made out to whom, please?

A It is payable to Macon Iron, Paper & Steel.

Q All right. And I hand you G. 25 and ask you if that is another check which you supervised the making of from the microfilm?

A Yes.

Q And who is that check made payable to?

A James Enco.

Q And also on the Miller account?

A Right.

Q G. 31?

A This is also one of the check, the photo-copy of one made from one of the microfilms of the check.

Q I'm sorry. I handed you the wrong copy. G. 42?

A That is one of them.

Q All right. And that's another check from the Miller account?

A Yes.

Q And to whom is that one payable?

A Specialty Distributing Company.

Q Now, at the time when the bank receives a check on an account such as that, would you tell us what the procedure of the bank is in making the microfilm?

A Every item that comes to our bank is photographed.

[352] Q And what happens to the original document, please mam?

A They are mailed to the customer when the statement is ready.

Q Now, I hand you Govt. Ex. 56 and ask you to identify that, please.

A These are deposits on the Mitch Miller account.

Q Are those also taken from the microfilm which you have displayed to us?

A Yes.

Q Did you supervise the making of those photo-copies?

A Yes.

Q What happened to the original of those deposit slips?

A The original of the deposit slip is in our bank.

Q But are these photo-copies of microfilm made on the same day to day basis as that of the checks?

A Yes.

Q All right. Pursuant to my request, have you gone through the deposits on the Mitch Miller account made during the months of September, October, November, December, 1972 and January of 1973?

A Yes sir.

Q And have you listed the cash deposits to that account during these months.

A I have the cash for October, November and December.

[353] Q All right. And are those indicated in the exhibit G. 56?

A Yes.

Q Would you please tell us what cash deposits were made in October through December, 1972?

A In October none were indicated as cash. November, 17, $1,000 cash; December on 12-1, $1620.00; 12-8, $400.00; 12-19, $450.00; 12-22, $2,000.00; 12-26, $100.00; 12-29, $200.00.

Q Did you calculate the total of the cash deposits during the month of December?

A Yes. It was $4,770.00.

MR. KNIGHT: Your Honor, at this time the Government would like to tender into evidence the documents that she has identified, *G. 56, 42, 25 and 45.*

THE COURT: All right, any objections?

MR. RAMPEY: Your Honor, I would like to look at them first.

THE COURT: Yes sir, you may.

CROSS EXAMINATION

BY MR. RAMPEY:

Q Mrs. Bedsole, you said these are some of the records of Mr. Miller's account that have been furnished to the Government?

A Yes.

Q How much of his account have you furnished to the Government?

[354] A From October 1 through January 9 is when we were asked to furnish it.

Q So you provided copies of all checks written on his account for those dates, copies of deposit slips which I believe you said the originals are at the bank? Is that correct?

A The original of the deposit slips are kept at the bank.

Q And you say you microfilm all items now?

A Yes.

Q Does that include all of your checks drawn on personal or business accounts?

A All checks that are drawn on our bank.

Q This is done pursuant to a federal requirement? The law requires that?

A Right.

Q I don't know, maybe you can read this, but one of these deposit slips doesn't appear to be readable, or I can't read it. What deposit slip is that on, I think it's page 2.

A This was a $500 deposit credited to the Mitch Miller account.

Q What is the date of that deposit?

A November 20.

Q Is that a deposit by check or can you tell from that copy of the slip?

A You can not tell from this copy.

[355] Q That's not one of the deposits that you read off to the District Attorney is it?

A No.

Q All right. On the cash deposits, is that normally set out on the deposit slip?

A Not always.

Q All right. If a customer cashes a check for a certain amount of money and deposits a portion of it as cash in his account and retains a portion of it, how would that show up on a deposit slip?

A It could show as cash if he did not indicate that it was a check less some cash returned.

Q So, say you deposit a $200 check and retain a certain amount in cash, the other was placed in your account, that might show as cash?

A Right.

Q Although in fact it might not be a true cash transaction? Is that correct? I mean cash in the sense of folding money. When you say "cash" in that sense is that a banking term?

A No. We refer to cash as currency, but he could have cashed a check and returned a portion of the cash to the teller for deposit.

Q That might be set up as a cash transaction?

A Right.

Q On the deposit slip.

[356] THE COURT. How, otherwise, would a check that is partially deposited to an account be shown?

A This would reflect on our teller records.

THE COURT: Yes, mam, but in an every day sense, if I take a hundred dollar check I can enter it on there as a hundred dollar check and put "less cash $50" can't I?

A Yes sir.

THE COURT: And the teller hands me $50 in cash and credits $50 to my account?

A Yes sir.

THE COURT: That's another method of doing the same thing?

A Yes sir. It could show as cash, or as a check less cash.

THE COURT: Yes mam.

Q So these deposits would not necessarily, in all instances, reflect a true folding money deposit, would they? I mean under those circumstances that you have detailed.

A There possibly could have been a check cashed previously to the deposit.

Q All right, thank you.

THE COURT: How about those exhibits that were offered in evidence, Gentlemen?

MR. RAMPEY: We don't have any objections to these exhibits, Your Honor, except as to this one that is difficult to read, but I believe she testified that this is not one of the cash deposits she detailed.

[357] THE COURT: All right, sir.

MR. RAMPEY: That's on the second page of the exhibit. As to the legality of it, I don't know whether the Government wants to substitute—

THE COURT: Well, we'll leave that up to them, but there being no objections they are *admitted.* (G. 56, 42, 25, 45)

MRS. NONA JONES, being called by the Government, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KNIGHT:

Q Would you state your name, please?
A Nona Elizabeth Jones, Byron, Georgia.
Q And where are you employed?
A Bank of Byron.
Q What is your job?
A Bookkeeping.

Q Does your job as bookkeeper also consist of keeping microfilm records of the bank?

A Yes sir.

Q Were you subpoenaed to bring certain of those records with you here today?

A Yes, sir.

Q And have you done so?

A Yes, sir.

Q Is that them right there by you?

[358] A Yes sir.

Q I show you what has been marked Govt. Ex. 31 and ask you what that is?

A This is the copy of the microfilm of the checks at our bank.

Q Did you make this copy personally?

A Yes sir.

Q On whose account is that check drawn?

A Mrs. Minne Lynn Miller.

Q What signature appears on the check?

A Mitch Miller.

Q And who is the check made out to?

A K & B Service Station.

Q What amount?

A $548.84.

Q Did you make this copy from the microfilm yourself, personally?

A Yes sir.

Q Were you subpoenaed to bring certain other records with you here today?

A Yes sir.

A May I see them, please?

A Yes sir.

Q I hand you what has been marked Govt. Ex. 57-A, B and C and ask you if you will tell us first what 57-B is.

A This is a signature card which the girls go by to [359] file the checks to check the signature.

MR. LARSEN: May it please the Court, the proper way of handling this is to identify the documents and tender them into evidence before the contents are gone into.

THE COURT: Yes sir, that's correct.
Q Would you just identify what the document is?
A This is a signature card, power of attorney card.
MR. ALMAND: The Government would tender this at this time.
THE COURT: All right, what are the other exhibits.
Q What is 57-C?
A This is a deposit made to the Bank of Byron.
Q Is that a deposit slip?
A Yes sir.
Q And G. 57-A?
A This is a check on the Bank of Byron, Bank of Milan. Excuse me.
MR. ALMAND: The Government tenders each of these documents.
THE COURT: Any objections?
MR. LARSEN: I might ask a couple of questions.

CROSS EXAMINATION

BY MR. LARSEN:

Q You are not the custodian of the records of the Bank of Milan, are you, young lady?
A No sir, I am not.
[360] Q Is that a copy of a check, rather than a check?
A Right.
Q And that copy is taken from your records or the records of the Bank of Milan?
A This copy is taken from our records.
Q All right, thank you man.
MR. LARSEN: I have no objection, Your Honor.
THE COURT: All right, they are *all admitted?* (57-A, B, C.)

DIRECT EXAMINATION, Cont.

BY MR. ALMAND:

Q Would you explain, then, what 57-A is, please. No, 57-B. I'm sorry.

A Yes sir. This is a signature card which the girls go by to file the checks and to check the signature as the checks come into the bank.
Q Whose signature would appear on that card?
A The signatures that are authorized to sign the checks on that one account.
Q And what is 57-C?
A This is the original deposit slip which the deposit was made and credited to this account.
Q Okay. Now going back to 57-B; who is shown as authorized to sign that card?
A Mitch Miller and Minnie Lynn Miller.
Q Okay. And would you look then at 57—I'm mixed up [361] in my numbers. Look at 57-C, which is the deposit slip, and tell us what is on that?
A This is a deposit slip to the account of Minnie Lynn Miller, the account number, and the check which was deposited was Henry McDuffie and the amount is 15 hundred.
Q And it was a check from Henry McDuffie?
A Yes sir.
Q All right. Would you look at 57-A and tell us what that is?
A This is a check drawn on the Bank of Milan and made payable to M. Miller, and the check is signed by Henry McDuffie, and on the back it is endorsed and the account number, our account number.
Q Who endorsed it?
A M. Miller.
MR. ALMAND: Your Honor, we would also tender *G. 31* at this time.
MR. RAMPEY: No objections.
THE COURT: *Admitted.*

CROSS EXAMINATION

BY MR. RAMPEY:

Q Mrs. Jones, you said you got those particular checks that you have identified from microfilm of the

account of—well, whose account? Let me ask you this first.

A Minnie Lynn Miller.

[362] Q And someone else is allowed to sign, according to the signature card?

A Yes sir.

Q Do you need to look at that to say who that was?

A Yes sir. This is Mitch Miller.

Q Now on this check that you have identified from the Bank of Milan, do you have those records on Mr. Miller's account with you right now?

A Yes sir, I have it on microfilm.

Q Well, do you know whether or not this check was in fact paid by the Bank of Milan?

A No sir. The check was not stamped. It's in our transit work. We work with C & S out of Macon and this is sent up and it takes a week or so before we can say that the check has been paid, and then the bank will send the check back to C & S and they in turn send it back to us if it has not been paid.

Q Well, what I am asking you is do you know whether or not this check was every paid?

A Yes sir.

Q Out of this account?

A Yes sir.

Q Was it ever paid?

A No sir.

Q It was an "insufficient funds" check?

A Insufficient funds, right.

[363] Q So it would never have been credited to Mr. Miller or to Mrs. Miller's account, would it?

A No sir.

Q And these are some of the records I believe you said you made available to the Government, is that correct.

A Yes.

Q Do you recall what other records of this account you made available to the Government?

A The dates that they asked me for were from October to January 9, Oct. 1, 1972 to January 9, 1973.

Q And those were made available under your supervision?

A Yes sir.

Q All of the microfilm?

A Yes sir.

Q Are all of the checks on this account on microfilm at the Bank of Byron?

A For those months, yes sir.

BY MR. LARSEN:

Q Is it Miss or Mrs. Jones?

A Mrs.

Q Mrs. Jones, how do you know that check was never paid by the Bank of Milan?

A The check was sent for collection, but first it was ran through our daily work and the check was sent back to us from the C & S charged to our account, "insufficient funds."

Q And then what did you do with it?

[364] A The check was sent directly to the bank for collection, the Bank of Milan.

Q How do you know that it was never paid by the Bank of Milan? Did you return the check to Mr. Miller or Mrs. Miller?

A Yes sir. The Bank of Milan sent the check back to us after they held it a certain length of time.

Q Well, now, let me ask you this though. How do you know what happened to that check after you returned it to Mr. or Mrs. Miller?

A I do not know what happened after that.

Q And do you know whether the Bank of Milan has since paid that check or not?

A Not to them personally, no sir.

Q Well, to them personally or to any other bank they may have deposited it in or any agent they sent down there to collect it?

A No sir, only to our bank is all.

Q All you know is when you testify under oath that the check had not been paid by the Bank of Milan is that it was not paid to your bank by the Bank of Milan?

A To our bank, right

Q And you do not know what the Bank of Milan may have otherwise done about that check, do you?

A No, sir.

Q Now, where is your record of the check not having been paid?

[365] A This is a copy where we charged it back to the account.

Q This is the record that was entered by your bank?

A Right, this is what we received from the Bank of Milan.

Q Now, do you know what the check was for? Do you have any record of what the check was for?

A The amount?

Q No, what it was given for?

A No sir, I don't.

Q You don't know whether it was for the purchase of furniture or what it might have been for, do you?

A No sir.

Q Thank you, mam.

MR. ALMAND: Your Honor, since counsel went into these, the Government at this time would introduce them into the record as part of its case.

THE COURT: Gentlemen, the Court doesn't see any relevancy of that at all.

MR. ALMAND: Yes sir.

THE COURT: The jury has heard what happened to the check and that ought to be sufficient.

MR. ALMAND: No further questions, Your Honor.

SUPREME COURT OF THE UNITED STATES

No. 74-1179

UNITED STATES, PETITIONER

v.

MITCHELL MILLER

ORDER ALLOWING CERTIORARI. Filed June 9, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-1179

UNITED STATES OF AMERICA,

Petitioner,

versus

MITCHELL MILLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-1179

UNITED STATES OF AMERICA,

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versus

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondent, MITCHELL MILLER, respectfully shows:

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 500 F. 2d 751 and is appended to the Government's Petition for a Writ of Certiorari. The Dissenting Opinion from the denial of rehearing en banc is also appended but is not yet reported.

STATEMENT OF JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

STATEMENT OF THE CASE

The petition and statement of the case is substantially correct. Respondent, however, feels that it is important to note that the checks entered in evidence at his second trial which were procurred by the subpoenas duces tecum issued to the Bank of Byron and C&S Bank of Warner Robins were admitted as evidence on overt acts nos. five, seven and eight in his Indictment.
(See Indictment at Vol. I, 8-9.)

ARGUMENT

The Respondent would ask this Honorable Court to deny the Government's Petition for Writ of Certiorari and allow the reversal of his conviction to stand so that he can proceed to a new trial. As briefed by the Petitioner, no consideration is given to the interaction of the recordkeeping provisions of the Bank Secrecy Act of 1970 (12 U.S.C. 31829 b (b)) and subpoena duces tecums issued by Grand Juries for microfilm records kept under the Act or the peculiar facts and circumstances surrounding the subpoenas duces tecum used to acquire copies of the Respondent's personal checks. Rather, the Government seeks to narrow the issues to standing and superficial compliance with the rules regarding issuance of subpoenas without considering the substantial incursion into the Respondent's private financial papers by the prosecution when no Grand Jury was in session.

Initially, it should be pointed out in this case that the Georgia Law at the time of the subpoenas in question save the two banks in question a limited interest in the original checks. At most, the bank retains the right to subrogate to the maker or drawer's interest arising from wrongful payment. (See Ga. Code Ann. 109A 4-407 (1973).) The original checks were customarily returned to the depositor according to the testimony of bank personnel at the hearing. (S. Tr. 32-55.) Also, return to the depositor is necessitated by the requirement that he review original

checks for wrongful payment, alteration or discrepancies within sixty days after receipt of the statement and checks or the bank will not be liable for unauthorized payments in the instances specified in the statement. (Ga. Code Ann. 109A 4-406 (1973))

This Court stated long ago in Boyd vs. United States, 116 U.S. 616 (1886), that"a compulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the fourth amendment to the Constitution . . ." In this case the agents of the Alcohol, Tobacco and Firearms Units acquired information from the Respondent's private financial records that could not have been obtained without a showing of probable cause before an impartial magistrate. Since 1967 search warrants for "new evidence" of crime (which is the object of the recordkeeping requirements of the Act) have been available. (Warden, Maryland Penitentiary vs. Hayden, 387 U.S. 294 (1967); 18 U.S.C. 310 3(a) (1970)). It is evident that the subpoenas were not seeking particular transactions or documentary evidence but were engaged in a general search of the Respondent's microfilmed records to ferret out evidence of possible criminal acts.

A subpoena duces tecum which is too sweeping may violate the Fourth Amendment. See generally 5 Orfield Criminal Procedure under the Federal Rules Section 41:7. Similarly, this Court has stated that "(i)t is contrary to the first principles of justice to allow a search through all of the Respondent's records, relevant or irrelevant in the hope that something will turn up." Fed. Trade Comm. vs. American Tobacco Co., 264 U.S. 298, 306 (1923). Here all the records perpetuated by the two banks including microfilmed checks for a period of almost three months were sought without specificity in an effort to ascertain possible wrongdoing. For these reasons the Respondent contends that the subpoenas duces tecum were tantamount to a search and seizure by ATF agents in violation of the Fourth Amendment.

The Respondent further contends that these subpoenas duces tecum cannot be used by the Government to give color to an

illegal search and seizure. (See Cf. Silverthorne Lumber Co. vs. U.S. 215 U.S. 385 (1919); see also, Wallace and Tiernan Company 76 F. Supp. 215, 217 (DCRI 1948). The copies of personal checks seized were kept under the compulsion of the recordkeeping requirements of the Bank Secrecy Act which is mandatory upon insured banks with civil and criminal sanction for non-compliance. This compulsion allows the Government to now contend that once the microfilm copies are made, they become property of the banks and customers are in effect divested of standing to contest acquisition of the copies from his banks by subpoena or otherwise under the Fourth Amendment because they have no proprietary interest in the microfilm copies. It is hard to see how it can be argued that these records are maintained by banks for their convenience and business purposes when the Act is compulsory and divests banks of any choice in these matters.

In this case the very need for some appearance of authority in the form of these subpoenas was required before the two banks made the records available and points to the existence of confidential relativity. The Government argues that there is no expectation of privacy in this instance, but the analogy is strong here between a bank customer presenting a personal check for the limited purpose of negotiation and return to him for his record and the user of a pay phone as in Katz vs. U.S. 389 U.S. 347 (1967), who is entitled to assume that what he says will not be broadcast to the world.

For these reasons the Respondent contends that all subpoena power and particularly the abusive circumstances here where even the Court is divested of scrutiny should not be adopted as a means of securing access to these records. In California Bankers Association vs. Schultz 416 U.S. 21 (1974), Justices filing separate opinions all expressed concern regarding access to the voluminous records created by the Act. Here access was obtained without judicial scrutiny notice to the depositor. The record in

this case demonstrates another potential abuse, i.e. advance or premature acquisition of records for future Grand Jury use apparently without ever presenting them to the investigative body or making a return in Court.

A person's bank account reflects not only his finances, but his interests, debts, politics, way of life, family and associations. It is respectfully submitted that the logic of United States vs. U. S. District Court 407 U.S. 297 (1972), where the Court said:

"The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." Id., at 317.

In this case only, there was no meaningful interaction of judicial authority that insures the protection of the Respondent's Fourth Amendment rights, his right to privacy or other constitutional rights secured to him and the Government's Petition should be denied.

CONCLUSION

For the reasons set forth above, the Respondent asks that the Petition for Writ of Certiorari in behalf of the Government be denied.

Respectfully submitted this 16 day of May, 1975.

D. L. Rampey, Jr.

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****

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Supreme Court of the United States and hereby certify that on the 16 day of May, 1975, I served a copy of the foregoing Brief in opposition to the Petition for Writ of Certiorari of the United States on the Honorable Robert H. Bork, Solicitor General, by mailing a copy thereto in a duly addressed envelope to the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, with First Class postage prepaid.

This 16 day of May, 1975.

D. L. Rampey, Jr.

D. L. RAMPEY, JR.

Supreme Court, U. S.
FILED
SEP 2 1975
MICHAEL RODAK, JR., CLERK

No. 74-1179

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

MITCHELL MILLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 500 F. 2d 751. The court's order denying rehearing *en banc* and the opinion dissenting therefrom (Pet. App. C) are reported at 508 F. 2d 588.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on September 13, 1974. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on January 15, 1975 (Pet. App. C). On February 6, 1975, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 16, 1975 (a Sunday), and the

petition was filed on March 17, 1975. The petition was granted on June 9, 1975 (App. 61). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a bank depositor has standing under the Fourth Amendment to challenge alleged irregularities in the issuance and scope of a subpoena *duces tecum* directed to a bank seeking production of its records of his account.

2. Whether (if the depositor has standing) a grand jury subpoena *duces tecum* is defective and violative of the Fourth Amendment (1) because issued by the district court clerk and completed by the United States Attorney's office on behalf of the grand jury, (2) because the grand jury was not sitting on the subpoena's return date, or (3) because the subpoena sought production of all records relating to a named depositor for a period of approximately four months.

3. Whether, if the Fourth Amendment was violated, a retrial was the proper remedy and, if so, whether exclusion of the evidence obtained by the defective grand jury subpoena is required in the retrial.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

Rule 17(a), Federal Rules of Criminal Procedure, provides in pertinent part:

> A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. * * *

Rule 17(c), Federal Rules of Criminal Procedure, provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

1. On December 18, 1972, on the basis of information supplied by an informant, a deputy sheriff in the County Sheriff's Department stopped a van-type truck, occupied by respondent's alleged co-conspirators Joseph Brooks and Terry Lee Smith, that was found to contain distillery apparatus (S. Tr. 56–66, 71–75).[1]

[1] "Tr." refers to the two-volume transcript of the trial, held May 7–14, 1973. "S. Tr." refers to the one-volume transcript of the suppression hearing, held April 18 and 23 and May 7, 1973.

On January 9, 1973, while fighting a fire at the Southeastern Metal Company warehouse in Kathleen, Georgia, which was rented to respondent (Tr. 162–168, 178–184), officials of the County Sheriff's Department discovered a 7,500 gallon-capacity distillery, 175 gallons of non-tax-paid whiskey, and related paraphernalia (Tr. 32–44).

Subsequently, at the request of Treasury Department agents who were investigating the distillery operation, subpoenas that had been issued in blank by the district court clerk were completed by the United States Attorney's office and served upon the presidents of the Bank of Byron, in Byron, Georgia, and the Citizens and Southern National Bank, in Warner Robins, Georgia, where respondent maintained accounts (App. 45). The subpoenas required the two bank presidents to appear in the United States District Court for the Middle District of Georgia at 9:00 a.m. on January 24, 1973, and to produce (App. 20, 22):

> all records of accounts, *i.e.*, savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date [January 22 and 23, 1973].[2]

Both banks maintained microfilm records of bank transactions, in compliance with regulations issued under the Bank Secrecy Act of 1970, 84 Stat. 1114–

[2] One subpoena was served on the president of the Bank of Byron on January 22, 1973; the other was served on the president of the Citizens and Southern National Bank on January 23, 1973.

1124, 12 U.S.C. 1829(d) (App. 24, 28).[3] The banks did not advise respondent that the subpoenas had been served (App. 24, 28).

[3] The Bank Secrecy Act is codified in 12 U.S.C. 1829b (retention of records by insured banks); 12 U.S.C. 1730d (retention of records of savings and loan institutions insured by the Federal Saving & Loan Ins. Corp.); 12 U.S.C. 1951–1959 (retention of records by noninsured financial institutions); and 31 U.S.C. 1051–1122 (reporting of domestic and foreign currency transactions).

The pertinent section of the Act, 12 U.S.C. 1829b(d), provides:

> Each insured bank shall make, to the extent that the regulations of the Secretary so require—
>
> (1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and
>
> (2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

The regulations promulgated pursuant to Section 1829b require that each bank maintain copies of signature cards, ledger cards, and the depositor's social security or taxpayer identification number. 31 C.F.R. § 103.34. Copies of checks upon which the bank is drawee must be maintained unless (1) the check is for not more than $100, or (2) the check is in an exempted category listed in Section 103.34(b)(3), such as certain payroll, dividend, or employee benefit checks. Until the amendment of January 17, 1973, (38 Fed. Reg. 2175–2176), there was no exemption for checks not exceeding $100 (37 Fed. Reg. 6914). Banks which photocopy or record checks deposited to its customer's account in the ordinary course of business must retain such records for two years pursuant to 31 C.F.R. §§ 103.34(b)(10), 301.36(c). Other records required by § 103.34 must be retained for five years. 31 C.F.R. § 103.36(c).

Prior to the effective date of the regulations, the Citizens and Southern National Bank made microfilm copies only of selected transactions rather than of all checks and deposits; the record does not reveal whether the Bank of Byron had previously kept such records (Pet. App. A, pp. 12a–13a).

In compliance with the subpoenas, the presidents of the two banks ordered their employees to make the records available to the agents and provide them with copies of whatever documents they desired (App 24, 28). At the Bank of Byron, Treasury agents inspected microfilm records of the account of Mrs. Minnie Lyn Miller, on which respondent was authorized to draw checks, for the period of time indicated on the subpoena (App. 28). The agents took copies of one deposit slip and one or two checks (App. 41). The Citizens and Southern National Bank supplied the agents with copies of its records of respondent's account during the applicable period, including all checks, deposit slips, two financial statements, and three monthly statements (App. 42–43).[4] The agents then informed the two bank presidents that it would not be necessary for them to appear in person before the grand jury (App. 24, 28).

The grand jury met on February 12, 1973, nineteen days after the return date on the subpoenas.[5] On March 15, 1973, the grand jury returned an indictment in the United States District Court for the Middle District of Georgia, which charged respondent and four others[6] with possession of an unregistered

[4] Copies of the bank records given to the Treasury agents are being lodged with the Clerk of this Court.

[5] The record does not reveal whether any of the bank records were presented to the grand jury.

[6] John Henry McDuffie, Terry Lee Smith, and Joseph Kenneth Brooks were, along with respondent, charged on all five counts. Susan McDuffie Weeks was charged only on the conspiracy count.

still, carrying on the business of a distiller without giving bond and with intent to defraud the government of whiskey tax, possession of 175 gallons of whiskey upon which no taxes had been paid, and conspiracy to defraud the United States of tax revenues, in violation of 18 U.S.C. 371 and 26 U.S.C. 5179, 5205, and 5601, *et seq.* (App. 9–14). The overt acts alleged to have been committed in furtherance of the conspiracy included respondent's rental of a van-type truck from K & B Service Station, for the period October 25 to November 22, 1972, his purchase of antennas and connections for two mobile radio units and two base station radios from Specialty Distributing Company on November 1, 1972, and his purchase of a quantity of sheet metal and metal pipe from Macon Iron and Paper Stock Company on November 11, 1972 (App. 11–12).

The bank records were turned over to the United States Attorney's office to be used in the investigation (App. 43). They provided in "one or two instances" investigatory leads to evidence that subsequently was introduced at trial (*ibid.*).

Prior to trial, respondent moved to suppress the checks and other bank records on the ground that they had been obtained by means of grand jury subpoenas *duces tecum* that were illegal because they were returnable on a date when the grand jury was not in session and they did not specify with reasonable particularity the items sought to be produced (App. 15–19). The district court denied the motion (App. 49).

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2. The trial commenced on May 7, 1973.[7] The evidence showed that respondent had arranged for rental of the warehouse (Tr. 783–789) and had purchased a water pump (Tr. 240–247) and radio equipment found in the warehouse (Tr. 247–258). He had also arranged for the purchase of a truck (later found to contain a still cap and wheat shorts) (Tr. 559–586), paid for repairs of two vans used in the distillery operation (Tr. 327–340), and inquired about making large purchases of sugar (up to 1,000 tons) for a distillery operation (Tr. 298–327). The government introduced into evidence copies of several checks drawn by respondent and payable to Macon Iron and Paper Company (App. 50), the Specialty Distributing Company (*ibid.*) and the K & B Service Station (App. 55). It also introduced copies of respondent's deposit slips, showing that $1,000 had been deposited into his account on November 17, 1972 and $4,770 in December, 1972 (App. 51), and copies of two checks drawn on the account of co-defendant Henry McDuffie and payable to respondent, one of which was in the amount of $1,500 (App. 57).

Respondent testified that he had not participated in the distillery operation (Tr. 815–819) and that he

[7] Respondent's first trial had begun on April 23, 1973, but ended in a mistrial on May 1, 1973.

Of the five persons who had been indicted, John Henry McDuffie and Susan McDuffie Weeks were tried with respondent. The charges against Terry Lee Smith were dismissed prior to trial, and Joseph Kenneth Brooks' motion for severance was granted. Brooks subsequently entered a plea of guilty to one count of the indictment and was sentenced to five years' probation.

had provided services to his co-defendants only at the request of a friend of a long-time associate (Tr. 782–790, 818–820).

Respondent was convicted on each of the five counts and sentenced to concurrent terms of three years' imprisonment on each count.[8]

3. On appeal, the court of appeals held that the subpoenas *duces tecum* served on the two banks were faulty because they were issued by the United States Attorney's office rather than by the district court or the grand jury, were returnable on a date when no grand jury was in session, and required "broad disclosure" of respondent's financial records to the government (Pet. App. A, p. 15a). The court further held that obtaining copies of respondent's bank checks by means of a faulty subpoena *duces tecum* constituted an unlawful invasion of respondent's Fourth Amendment interest in the "privacy" of his papers and records (Pet. App. A, pp. 10a–11a), and that respondent therefore was "entitled to a new trial free from the taint of evidence improperly acquired" (Pet. App. A, p. 16a).[9]

[8] McDuffie was also convicted on all five counts and sentenced to concurrent terms of three years' imprisonment on each count. Weeks was convicted on the conspiracy count and sentenced to a term of five years' probation (Pet. App. A, p. 3a).

[9] The court deferred decision on whether the trial court had improperly overruled, on the basis of lack of standing, respondent's motion to suppress distillery apparatus that had been seized from a truck over which the government showed him to have exercised control. The court noted that respondent had failed at the suppression hearing to assert any proprietary interest in the truck, as is required for standing to challenge a search under

4. The government's petition for rehearing and suggestion of rehearing *en banc* were denied (Pet. App. C, pp. 38a–53a). Seven Circuit Judges dissented from the denial of rehearing *en banc* on the grounds that "the panel opinion departs radically from prior decisions denying to bank customers the standing to challenge subpoenas of bank records of their accounts" (Pet. App. C, p. 39a) and that, even if depositor standing is assumed, "we do not agree that [the subpoenas] were defective. And even if the subpoenas were defective, no prejudice is shown such as to require their suppression" (Pet. App. C, p. 48a).

SUMMARY OF ARGUMENT

The decision of the court of appeals is built on three components, each of which must be correct in order to support suppression at retrial of evidence obtained or derived from the allegedly defective grand jury subpoenas: (1) that a bank depositor has a protectable Fourth Amendment interest in a bank's records of his account; (2) that a subpoena *duces tecum* directed to the bank seeking production of such records is defective if issued by the district court clerk and completed by the United States Attorney's office, returnable on a date when the grand jury is not sitting, or seeking production of records of a depositor's account for a period of approximately four months, and that these defects constitute an unreasonable search and seizure even if the bank voluntarily complies with the subpoena; and (3) that the appropriate remedy is a retrial from which the records and evidence derived therefrom are excluded. We contend that the court erred in its disposition of each of these three issues.

Brown v. *United States*, 411 U.S. 223, but opined that the government's "duplicitous tactics" in opposing respondent's standing to challenge the search of the truck while attempting to prove his control over it might nevertheless be sufficient to confer standing under *Jones* v. *United States*, 362 U.S. 257. Rather than resolve this question, the court relied upon the fact that respondent would have another opportunity at the retrial to assert his proprietary interest in the truck (Pet. App. A, pp. 16a–22a). If this Court agrees with the government that no retrial is necessary, however, the case should be remanded to the court of appeals for disposition of this remaining issue.

The court also affirmed Weeks' conviction and reversed McDuffie's conviction because of the introduction of evidence relating to a prior offense (Pet. App. A, p. 35a). We have not sought review of the court of appeals' decision as it relates to McDuffie.

I

A. Two kinds of interests have been accorded Fourth Amendment protection from unreasonable searches or seizures: a person's proprietary interests in his premises, papers or effects; and his justifiable expectation that the government will not intrude upon his presence in certain private circumstances. Neither of these interests is applicable to bank records of a person's bank account. Such records do not constitute the bank depositor's private papers, since the bank owns and possesses them, no differently from ownership and possession exercised by any party over records it maintains of its business transactions with others. A subpoena directed against the bank seeking access to such records may of course implicate depositors whose transactions with the bank are therein recorded, but

the Fourth Amendment protects only a person "against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." *Jones* v. *United States,* 362 U.S. 257, 261; see *Donaldson* v. *United States,* 400 U.S. 517, 530.

A bank depositor has no justifiable expectation that information he conveys to the bank in the course of his transactions with it will remain private. While the Fourth Amendment bars the government from unreasonably intruding upon a person's private communications, it does not protect that person from government acquisition of the information so conveyed, even if he expects that the party with whom he communicates will not reveal the information to the government. *United States* v. *White,* 401 U.S. 745, 749. A person has no more standing to complain of a subpoena *duces tecum* directed at a bank seeking records of his bank account than of a subpoena directing a trusted friend to testify as to what he knows about the person's affairs.

Nor is there any reason why the confidentiality of information conveyed to banks in the normal course of commercial transactions should be entitled to more protection than similar information conveyed to one's accountant. *Couch* v. *United States,* 409 U.S. 322. Banks have no express or implied contractual obligation to their depositors to resist divulging the records of their accounts to the government, and neither state

nor federal law has recognized a confidential banker-depositor evidentiary privilege.

Finally, the information conveyed on bank checks is not the sort of information that a person justifiably intends to keep private, since he knowingly exposes it to the public in the normal course of his commercial transactions. Indeed, in order for negotiable instruments to be useful as a medium of exchange it is necessary that names of payees or drawers, dates, and other memoranda appearing on them be cognizable to any number of payees, endorsees and bank employees, all of whom are free to record or copy the information so conveyed.

B. The Bank Secrecy Act, which authorizes the Secretary of the Treasury to require that banks maintain records of their depositors' accounts, did not give depositors any proprietary or privacy interest where none existed before. The records remain the bank's property, and depositors have no greater reason than before to expect that the information conveyed therein will remain private. If anything, they have less reason, since the records are required to be maintained because of their potential usefulness in government investigations. Moreover, in promulgating the Act, Congress clearly specified that the record keeping requirements should not alter the manner by which the government traditionally had obtained access to such records when banks voluntarily maintained them. It stressed that "existing legal process" should continue to govern such access. As we have indicated,

"existing legal process" accords no standing to a bank depositor to challenge a subpoena *duces tecum* directed to the bank for copies of its records of the Depositor's account.

II

Even if it is assumed that a bank depositor has standing under the Fourth Amendment to challenge a subpoena *duces tecum* of bank records of his account, the two subpoenas in the instant case—issued in blank by the district court clerk and completed by the United States Attorney's office, returnable on a date when the grand jury did not sit, and seeking records of respondent's account for a period of approximately four months—fully comported with legal process governing the issuance of grand jury subpoenas, and did not constitute an unreasonable search or seizure.

A. Rule 17 of the Federal Rules of Criminal Procedure authorizes the clerk of the district court to issue a subpoena in blank to a party requesting it. There is no need for a court or grand jury to approve each subpoena prior to service since a grand jury subpoena, unlike a search warrant, is merely a request to produce documents and is not self-enforcing. Subpoenaed parties are adequately protected from an unreasonable subpoena by having the opportunity to obtain an order to quash the subpoena if production would be unreasonable or oppressive (Rule 17(c), Fed. R. Crim. P.), or to contest the subpoena in a show cause hearing.

The court of appeals' additional requirement that

the subpoena be returnable on a date when the grand jury is in session is similarly unnecessary and inappropriate, since the grand jury depends upon the presentation of relevant evidence in an orderly manner, which ordinarily requires the government attorney to review the evidence prior to its presentation to the grand jury. Moreover, in many districts the grand jury meets infrequently and its sessions are of brief duration.

Finally, the subpoenas in the instant case were sufficiently particularized. They identified respondent, his home and business address, and the precise dates at issue. The records sought were described with sufficient definiteness so that the subpoenaed parties knew what was sought and were able to comply without undue difficulty—strong evidence of the adequacy of the description. *Brown* v. *United States*, 276 U.S. 134, 143.

B. Even if the subpoenas were defective in one or more of the respects stated by the court of appeals, the question whether they constituted an unreasonable search or seizure nevertheless turns upon the extent to which compliance was burdensome, as against the relevance and materiality of the items sought. Here, the bank rather than the depositor bore the full burden of producing the records. Moreover, the records were clearly relevant and material to the grand jury's inquiry, since they encompassed the period of time from December 18, 1972, when a truck was found to contain distillery apparatus, to January 9, 1973, when a distillery and non-tax-paid whiskey were found at the warehouse, which was rented to respondent.

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In any event, the banks' voluntary compliance with the subpoenas here fully satisfied the Fourth Amendment. Since the bank exercises at least as much control over, and has at least as much access to, its records of a depositor's account as does the depositor himself, the bank has authority to consent to government access to such records, notwithstanding the depositor's interest. *United States* v. *Matlock,* 415 U.S. 164, 171, n. 7; *Frazier* v. *Cupp,* 394 U.S. 731, 740.

III

Even if the subpoenas *duces tecum* were defective and violative of respondent's Fourth Amendment rights, it would not follow that the proper remedy would be a retrial at which the bank records and evidence derived therefrom must be excluded. A new trial would merely waste judicial resources; the excluded records presumably could be reacquired pursuant to validly issued subpoenas, since the government's knowledge of the existence and location of the records was derived independently from the seizure effected under the original subpoenas. *Wong Sun* v. *United States,* 371 U.S. 471, 488.

Even if issuance of the subpoenas was improper, this is not the kind of impropriety for which the drastic remedy of evidentiary suppression is either necessary or appropriate. There is no reason to suppose that any rules that may be announced by the courts regarding the obligations of government attorneys to inform bank depositors when subpoenas are issued for the records of their bank accounts (so that the depositors may challenge any improprieties) would be ignored or disobeyed. Moreover, the exclusionary rem-

edy would be particularly inappropriate in this case, where there is no reason to believe that any deficiency in the subpoenas was deliberate, where at the time of issuance there was no court holding that bank depositors should be notified when bank subpoenas are served, and where it is likely that the subpoenas would have been enforced even had respondent been given an opportunity to challenge them.

ARGUMENT

The decision of the court of appeals is based upon three premises, each of which is necessary to the result it reached: (1) that a bank depositor has a protectable Fourth Amendment interest in a bank's records of his account (discussed in point I, *infra*); (2) that a subpoena *duces tecum* directed to the bank seeking production of such records is defective (a) because issued by the district court clerk and completed by the United States Attorney's office on behalf of the grand jury, (b) because the grand jury was not sitting on the subpoena's return date, or (c) because the subpoena sought production of all records relating to the depositor for a period of approximately four months; and that these defects constitute an unreasonable search or seizure in violation of the Fourth Amendment, even if the bank consents to the government search (discussed in point II, *infra*); and (3) that it is appropriate in these circumstances to have a retrial in which evidence obtained by the defective grand jury subpoenas would be excluded (discussed in point III, *infra*). If the court erred in any of these conclu-

sions, reversal must follow; we contend that each was in error.

I

A BANK DEPOSITOR HAS NO STANDING UNDER THE FOURTH AMENDMENT TO CHALLENGE ALLEGED IRREGULARITIES IN THE ISSUANCE AND SCOPE OF A SUBPOENA DUCES TECUM DIRECTED TO A BANK SEEKING PRODUCTION OF ITS RECORDS OF HIS ACCOUNT

The court of appeals assumed, without articulating its reasoning, that a bank depositor has a protectable Fourth Amendment interest in the bank's records of his account. It seems apparent, however, that this conclusion was based to some extent on the court's notion that the government had "circumvented" the traditional Fourth Amendment protection accorded a person's private papers by requiring the banks to maintain such records and then relying upon the failure of the banks to challenge allegedly improper legal process to obtain them (see Pet. App. A, pp. 13a–14a).

The court thus assumed that various items of information contained on checks that a bank depositor draws on his account or deposits into his account are the constitutional equivalent of the depositor's "private papers" which are protected by the Fourth Amendment from unreasonable government acquisition.[10] But as we show in the following sections, there

[10] The court of appeals primarily relied upon *Boyd* v. *United States*, 116 U.S. 616, in which this Court stated that "a compulsory production of a man's private papers to establish a criminal charge against him * * * is within the scope of the Fourth Amendment * * *" (*id.* at 622). But as the Court recognized in *Couch* v. *United States*, 409 U.S. 322, 330, "[i]n *Boyd*, the person asserting the privilege was in possession of the written statements in question. * * * That case did not, however, address or contemplate the divergence of ownership and possession * * *." Nor, we would add, did it contemplate the complete lack of both ownership and possession.

is no warrant in the history or logic of the Fourth Amendment for expanding the concept of "private papers" to encompass information voluntarily conveyed to a third party, even one who is a trusted (but not privileged) confidant. The fact that the third party is required by law to maintain records of such information creates no protectable interest where none existed before.

Such an unwarranted expansion of Fourth Amendment protection would seriously impair the functioning of the grand jury, which must often rely upon records of transactions maintained by third party institutions, such as banks. Indeed, the Bank Secrecy Act of 1970 was expressly designed to insure that banks maintain adequate records that could be useful in criminal investigations. So long as government access to such records does not abridge the Fourth Amendment rights of the persons who own and maintain them, there is no Fourth amendment impediment to their production.

A. A BANK DEPOSITOR HAS NO PROTECTABLE FOURTH AMENDMENT INTEREST IN A BANK'S RECORDS OF HIS ACCOUNT

The records of a bank depositor's account, owned and maintained by the bank with which he deals, are not within the set of objects or areas whose search or seizure the depositor can protect under the Fourth

Amendment. We show in the following sections that his relationship to the records is too remote to give rise to any protectable Fourth Amendment interest, since he neither owns nor possesses the records and has no reason to expect that their contents will remain private.[11]

1. *A depositor has no proprietary or possessory interest in such records.*

The Fourth Amendment guarantees "[t]he right of the people to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures * * *" (emphasis supplied). Bank records (including the microfilm copies of respondent's checks, deposit slips and statements involved in the instant case)[12] are not the "papers" of bank depositors. They are bank property—made, paid for, and maintained

[11] We do not address the question whether or under what circumstances a bank depositor may have a sufficiently protectable First Amendment interest in bank records of his account to give him standing to challenge a subpoena *duces tecum* directed at the bank for such records. See *California Bankers Assn.* v. *Schultz*, 416 U.S. 21, 55–57; *United States Servicemen's Fund* v. *Eastland*, 488 F. 2d 1252 (C.A.D.C.), reversed and remanded, No. 73–1923, decided May 27, 1975; *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark.), affirmed *per curiam*, 393 U.S. 14. Respondent raised no First Amendment claim below, nor does the record reveal any basis for such a claim.

[12] The bank records received by Treasury agents in the instant case included copies of respondent's bank checks, checking account deposit slips, monthly checking account statements, and two financial statements submitted by respondent to the Citizens and Southern National Bank for the purpose of obtaining credit (see copies of the bank records that we have lodged with the Clerk of this Court). Respondent moved to suppress "certain original and microfilm copies of his personal and business checks * * * as well as other information supplied" (App. 16). On appeal, respondent challenged the introduction at trial of copies of the bank checks (Pet. App. A, p. 9a). The court of appeals held that the trial court should not have admitted into evidence copies of respondent's bank checks or "any evidence resulting from investigative leads provided by information from those checks" (Pet. App. A, p. 16a). The record does not reveal whether any evidence resulted from investigative leads provided by such information or by information on the deposit slips, checking account statements, or two financial statements.

by the bank for its convenience and for business and legal purposes.[13] The bank is a party to each of the transactions that it records, and earns a portion of its income from conducting such transactions. See *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 66. The bank's ownership, possession and control of the records is no different from the ownership, possession and control exercised by any party over records it maintains of its business transactions. Hence the records are, like corporate records of salary payments and

[13] To be sure, the cancelled checks themselves are the property of the drawer. (At common law a check became the property of the drawer when paid; the bank thereafter held the check as the drawer's agent. See *Van Dyke* v. *Ogden Sav. Bank*, 48 Utah 606, 615–616, 161 Pac. 50, 54 (1916); *The Queen* v. *Watts*, 169 Eng. Rep. 398, 401 (C.C. 1850); *Burton* v. *Payne*, 172 Eng. Rep. 236 (K.B. 1827); *Partridge* v. *Coates*, 171 Eng. Rep. 976, 977 (K.B. 1824); Grant, *A Treatise on the Law Relating to Bankers and Banking* 75–78 (1857); 2 Morse, *A Treatise on the Law of Banks and Banking* § 460 (6th ed. 1928). See also Uniform Commercial Code §§ 4–201, 4–105(d), 4–208). But this has no bearing upon the legal status of microfilm copies of the checks that are maintained by the bank.

While certain commercially valuable information may be characterized as "property" (see, *e.g.*, *Board of Trade of the City of Chicago* v. *Christie Grain and Stock Co.*, 198 U.S. 236, 251), there is no contention that the information continued on respondent's checks, deposit slips and statements was commercially valuable.

other transactions with an employee-taxpayer sought by an Internal Revenue summons, "records in which the taxpayer [or depositor] has no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer [or depositor]." *Donaldson* v. *United States*, 400 U.S. 517, 523.

The Court in *Donaldson* accordingly held that the employee-taxpayer had no right to intervene in a proceeding to enforce an Internal Revenue Service summons against the taxpayer's former employer and its accountant for production of records of the taxpayer's employment and compensation during the years under investigation. In language that is as applicable to grand jury investigations as it was to Internal Revenue investigations, the Court concluded that if taxpayers had a right to intervene when the summons sought production of such records from a third party, it "would unwarrantedly cast doubt upon and stultify the Service's every investigatory move" (*id.* at 531).[14] For, as Mr. Justice Douglas observed in

[14] Similarly, in *Application of Cole*, 342 F. 2d 5 (C.A. 2), certiorari denied, 381 U.S. 950, which was cited with approval in *Donaldson* (400 U.S. at 530), the court held that a taxpayer had no right to notice of the issuance of a summons to its bank. As the Second Circuit there explained (342 F. 2d at 7–8):

"* * * [A]ll of the records, documents and papers which were the subject matter of the summons were the property of the Bank on whom the summons was served. None of the material sought belonged to the taxpayers or involved the work product of their attorneys. They had no interest in any of them in the sense that they had a right to any of them. * * *

"The taxpayer, under circumstances where only books, records and other papers belonging to the third party are the subject of the summons, has no standing to object to the summons."

his concurring opinion (*id.* at 537), "it is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress."

Thus, because of the interrelationship between the intervention question and the rights sought to be asserted," *Donaldson* was in part an application of the general principle that the Fourth Amendment does not protect *jus tertii* interests. As this Court stated in *Jones* v. *United States*, 362 U.S. 257, 261, the Fourth Amendment protects a person "against whom the search was directed, as distinguished from one who claims prejudice only through the use of the evidence gathered as a consequence of a search or seizure directed at someone else." See also *Alderman* v. *United States*, 394 U.S. 165, 171–173; *Wong Sun* v. *United States*, 371 U.S. 471, 492; *Goldstein* v. *United States*, 316 U.S. 114, 121. While a depositor may feel genuinely unhappy about a government seizure of records belonging to the bank with which he has an account, particularly if the records contain information that incriminates him, his Fourth Amendment rights are not violated even if the government improperly obtains the documents. Cf. *Burdeau* v. *McDowell*, 256 U.S. 465.

Accordingly, the great majority of federal courts that have considered the issue (usually in the context

[15] Rule 24(a)(2), Fed. R. Civ. P., authorizes intervention as of right by an individual who has "an interest relating to the property * * * which is the subject of the action" and who "is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest."

of Internal Revenue Service summonses rather than grand jury subpoenas) have concluded, correctly we submit, that a bank's records of its transactions with a depositor are not the private papers of the depositor, and that the depositor therefore has no standing to challenge the validity of a search or seizure of bank records of his account.[16]

[16] See *United States* v. *Continental Bank and Trust Co.*, 503 F. 2d 45, 49–50 (C.A. 10) (IRS summons); *Fifth Avenue Peace Parade Committee* v. *Gray*, 480 F. 2d 326, 332 (C.A. 2), certiorari denied, 415 U.S. 948 (FBI investigation); *United States* v. *Gross*, 416 F. 2d 1205, 1212–1213 (C.A. 8) (FBI investigation); *Dosek* v. *United States*, 405 F. 2d 405, 409 (C.A. 8) (IRS summons); *Harris* v. *United States*, 413 F. 2d 316, 318 (C.A. 9) (grand jury investigation); *Galbraith* v. *United States*, 387 F. 2d 617, 618–619 (C.A. 10) (SEC civil investigation); *O'Donnell* v. *Sullivan*, 364 F. 2d 43, 44 (C.A. 1), certiorari denied, 385 U.S. 969 (IRS summons); *Application of Cole*, 342 F. 2d 5, 8 (C.A. 2), certiorari denied, 381 U.S. 950 (IRS summons); *DeMasters* v. *Arend*, 313 F. 2d 79, 85 (C.A. 9), petition for certiorari dismissed, 375 U.S. 936 (IRS summons); *Foster* v. *United States*, 265 F. 2d 183, 187–188 (C.A. 2), certiorari denied, 360 U.S. 912 (IRS summons); *United States* v. *Peoples Deposit Bank & Trust Co.*, 112 F. Supp. 720, 723–724 (E.D. Ky.), affirmed, 212 F. 2d 86 (C.A. 6) (IRS summons), certiorari denied, 348 U.S. 838; *In re Upham's Income Tax*, 18 F. Supp. 737, 738 (S.D.N.Y.) (IRS summons); *Cooley V. Bergin*, 27 F. 2d 930, 933 (C.A. 2) (IRS summons); cf. *Pollard* v. *Roberts*, 283 F. Supp. 248, 258–259 (E.D. Ark.), affirmed *per curiam*, 393 U.S. 14. And see *Riddick* v. *United States*, C.A. 8, No. 75–1060, denied July 15, 1975, slip op. pp. 8–10, specifically declining to follow the court of appeals' decision in the present case. But see *Burrows* v. *Superior Court of San Bernardino County*, 529 P. 2d 590, petition for rehearing denied, March 12, 1975 (Sup. Ct. of Cal.).

Moreover, cases following *Donaldson* have uniformly denied depositors any right to intervene in summons enforcement proceedings for bank account records, on the ground that depositors have no proprietary interest in the records. See *United*

2. *A depositor has no reason to expect that the information contained in such records will remain private.*

a. A bank depositor does not, for Fourth Amendment purposes, entertain any "reasonable expectation of freedom from governmental intrusion" (*Mancusi* v. *DeForte*, 392 U.S. 364, 368; *Katz* v. *United States*, 389 U.S. 347, 352) with regard to his banking transactions. While *Katz* held that government electronic surveillance of a telephone booth without a warrant violated the occupant's Fourth Amendment right to be free from unreasonable government eavesdropping, it did not hold that the user of a telephone booth is constitutionally protected from subsequent government acquisition from the other party to an unprivileged conversation of the information therein conveyed. To the contrary, as Mr. Justice White explained in *United States* v. *White*, 401 U.S. 745, 749 (in a portion of the plurality opinion with which no Justice expressed disagreement):

States v. *National State Bank*, 454 F. 2d 1249, 1251, n. 3, 1252 (C.A. 7); *Securities and Exchange Commission* v. *First Security Bank of Utah*, 447 F. 2d 166, 168 (C.A. 10); *United States* v. *Bremicker*, 365 F. Supp. 701, 702–703 (D. Minn.); *United States* v. *Union Nat'l Bank*, 363 F. Supp. 629, 631–633 (W.D. Pa.); *United States* v. *Northwest Pa. Bank & Trust Co.*, 355 F. Supp. 607, 612, 614 (W.D. Pa.); *Smith* v. *Switzer*, 73–2 U.S.T.C., ¶ 9490 (W.D. Pa., May 30, 1973). See also *United States* v. *Luther*, 481 F. 2d 429, 433 (C.A. 9) (taxpayer lacked proprietary interest in corporate records); *United States* v. *Weingarden*, 473 F. 2d 454, 458, n. 4 (C.A. 6) (taxpayer had no proprietary interest in attorney's records); *United States* v. *Widelski*, 452 F. 2d 1, 4 (C.A. 6) (no proprietary interest or privilege in accountant's records).

> *Katz* involved no revelation to the Government by a party to conversations with the defendant nor did the Court indicate in any way that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police.
>
> * * * * *
>
> * * * [H]owever strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities.

See also *Hoffa* v. *United States*, 385 U.S. 293; *Lewis* v. *United States*, 385 U.S. 206.

The same reasoning applies to a depositor's transactions with his bank. If the Fourth Amendment does not protect information given to a colleague who turns out to be a government agent, "however strongly a defendant may trust [him]" (*United States* v. *White*, *supra*, 401 U.S. at 749), it can scarcely be applicable to information voluntarily given to a bank that is not a government agent and that furnishes the information to the government pursuant to valid legal process.

Of course, bank checks and the maintenance of a bank account offer a convenient means of carrying on commercial transactions, and many persons deposit a part of their earnings in a bank in order to use its negotiable instruments in place of cash. But it is no more necessary to use bank checks and maintain a bank account than it is to engage in employment, sales, or business transactions or for some taxpayers to have

an accountant, and the confidentiality of information conveyed to banks in the normal course of commercial transactions is entitled to no more protection than is similar information conveyed to other persons with whom one deals or to one's accountant. See *Donaldson* v. *United States, supra; Couch* v. *United States,* 409 U.S. 322. Banks have no express or implied contractual obligation to their depositors to resist divulging the records of their accounts to the government.[17] And

[17] Some courts have held that a bank may not divulge customer information to other members of the public, basing their decision on implied contract, property, agency, or tort principles. See, *e.g.*, *Sparks* v. *Union Trust Company*, 256 N.C. 478, 124 S.E. 2d 365 (implied contract); *Milohnich* v. *First National Bank*, 24 So. 2d 759 (3d D. C.A. Fla.) (implied contract); *Brex* v. *Smith*, 104 N.J. Eq. 386, 146 Atl. 34 (property); *Peterson* v. *Idaho First National Bank*, 83 Idaho 578, 367 P. 2d 284 (agency); *Sewall* v. *Catlin*, 3 Wend. 291, 294–295 (Sup. Ct. N.Y.) (tort).

Nothing in the history of the relationship between banks and their depositors, however, would create a justifiable expectation that information conveyed in transactions with the bank would not be revealed to the government. To the contrary, it has been recognized that banks have a public duty to expend a reasonable effort in furnishing the government with records needed in judicial proceedings or in attempting to comply with a subpoena *duces tecum*. See, *e.g.*, *United States* v. *Dauphin Deposit Trust Co.*, 385 F. 2d 129, 130 (C.A. 3); *McMann* v. *Securities Exchange Commission*, 87 F. 2d 377 (C.A. 2), certiorari denied, 301 U.S. 684; *United States* v. *Jones*, 73–1 U.S.T.C. ¶ 9197 (M.D. Ala., October 6, 1972); *United States* v. *First Nat'l Bank of Mobile*, 67 F. Supp. 616, 625 (S.D. Ala.); see also *United States* v. *Bremicker*, 365 F. Supp. 701, 703 (D. Minn.) ("it would appear that the bank [served with an IRS summons] has a duty to cooperate, even in the absence of a court order").

no confidential banker-depositor privilege has been recognized under state or federal law.[18] "[T]he mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege." 8 Wigmore, *Evidence* § 2286, at 528 (McNaughton rev. 1961). As this Court recently noted, privileges such as those governing the relationship between attorney and client or priest and penitent are "exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710. Accordingly, the bank depositor has no justifiable expectation that information about his bank-

[18] See 8 Wigmore, *Evidence* § 2286 (McNaughton rev. 1961); see also *Bowles* v. *Shawano National Bank*, 151 F. 2d 749 (C.A. 7); *Foster* v. *United States*, *supra*; *Schulze* v. *Rayunec*, 350 F. 2d 666 (C.A. 7), certiorari denied *sub nom. Boughner* v. *Schulze*, 382 U.S. 919; *United States* v. *Gross*, 416 F. 2d 1205, 1212–1213 (C.A. 8) (opinion by Blackmun, J.); *United States* v. *Bremicker*, 365 F. Supp. 701, 702–703 (D. Minn.); *Societe Internationale* v. *McGranery*, 111 F. Supp. 435 (D. D.C.); *In re Davies*, 68 Kan. 791, 75 Pac. 1048; *State ex rel. G. M. Gustafson Co.* v. *Crookston Trust Co.*, 222 Minn. 17, 22 N.W. 2d 911.

See also *McMann* v. *Securities and Exchange Commission*, 87 F. 2d 377, 378–379 (C.A. 2), certiorari denied, 301 U.S. 684, in which the court refused to enjoin stockbrokers from complying with two SEC subpoenas *duces tecum* seeking copies of McMann's account. In response to McMann's arguments that the information sought was privileged and confidential and therefore constitutionally protected, Judge Learned Hand stated for the court:

"But the very fact that testimonial privileges are based upon specified confidential relations, is proof that they do not extend to all, and it hardly needs to be said that nobody by contract, express or implied, can abridge public duties."

ing transactions will not be acquired by the govenment.[19]

b. Even if it were assumed that the Fourth Amendment prohibits an unreasonable governmental seizure from a third person of information that one justifiably intends to keep private, the information conveyed on bank checks is not within that category. Names of payees or drawers, dates, and other memoranda appearing on such negotiable instruments are not intended to be confidential. Indeed, the commercial function of negotiable instruments requires that such information be conveyed. When a bank check is drawn, the instrument is cast forth upon a stream of commerce. A drawer understands that his payees may well endorse the instruments to third parties and that their endorsees may further endorse them. Nor can he prevent them from doing so. He normally has no control over the identities and number of persons other than his payee who ultimately will view the instrument, or to what extent any of them will record the information contained thereon.[20] Even when presenting for deposit a check drawn on someone else's account, he is aware that the instrument "will be viewed by various employees at the bank where it is cashed

[19] Indeed, even in relationships where a privilege is recognized, such as the attorney-client relationship, the privilege extends only to confidential communications between them and not to information concerning their financial transactions, such as the amount of the fee and who paid it. See, *e.g.*, *In re Michaelson*, 511 F. 2d 882 (C.A. 9), certiorari denied May 19, 1975 (No. 74–1011); *In re Semel*, 411 F. 2d 195, 197 (C.A. 3), certiorari denied, 396 U.S. 905; *Colton* v. *United States*, 306 F. 2d 633, 637 (C.A. 2), certiorari denied, 371 U.S. 951.

[20] See Chorley, *Law of Banking* 13–22 (4th ed. 1960).

or deposited, at the clearing house through which it must pass, and at his own [the drawer's] bank to which it will eventually return." *Harris* v. *United States,* 413 F. 2d 316, 319–320 (C.A. 9). See also *United States* v. *Judson,* 322 F. 2d 460, 463 (C.A. 9).

To be sure, those who are likely to view the instrument in commerce probably will not pay great attention to the identities of the drawer or payee, attach any special significance to the transaction, or remember its other details. But they are at liberty to do so, and the Fourth Amendment does not protect a person's expectation that others will not give close attention to what he knowingly exposes to them. Indeed, anyone who happens to view a negotiable instrument that is sent into commerce is free to keep a detailed record, or a copy, of it. If the viewer happens to be a large-scale creditor or debtor who handles a great number of such instruments, his records may well reveal much about the activities of those with whom he transacts. Since a bank is functionally equivalent to any other large-scale debtor that honors negotiable instruments drawn and sent into commerce by its creditors, the information that it receives on negotiable instruments that are presented for payment is no more immune from disclosure than is similar information on notes presented to other borrowers for payment. Cf. *California Bankers Assn.* v. *Schultz, supra,* 416 U.S. at 48–49.

The Fourth Amendment does not protect what "a person knowingly exposes to the public * * *." *Katz* v. *United States, supra,* 389 U.S. at 351. Accordingly, when a bank depositor voluntarily puts his checks into a public stream of commerce, there is no reason to protect him from government access to them. Nor is there any constitutional basis for " 'constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers.' " *United States* v. *Dionisio,* 410 U.S. 1, 14. Indeed, "the long-standing principle that 'the public * * * has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege * * * is particularly applicable to grand jury proceedings." *Branzburg* v. *Hayes,* 408 U.S. 665, 688 (footnote omitted). Accordingly, while some may believe that it is desirable as a matter of policy to adopt various measures limiting government access to bank records, this is a matter of legislative policy for determination by Congress, not a constitutional imperative.[21]

[21] Bills have recently been introduced in Congress to limit the disclosure of bank information. See S. 1343, 9th Cong., 1st Sess. (1975) ("[i]n any proceeding relating to such subpenas [of bank records] * * *, the customer shall have the same rights as if the records were in his possession." Section 4(b)); H.R. 2752, 94th Cong., 1st Sess. (1975) (same language); H.R. 550, 94th Cong., 1st Sess. (1975). Cf. 47 U.S.C. 605; 18 U.S.C. 2511 (telephone company or its employees prohibited from divulging the "existence, contents, substance, purport, effect, or meaning" of communications); 15 U.S.C. 1681–1681t (credit reporting agencies subject to statutory limitations and penalties for release of information gathered on consumers).

B. THE RECORD-KEEPING REQUIREMENTS OF THE BANK SECRECY ACT DID NOT CREATE ANY PROTECTABLE FOURTH AMENDMENT INTEREST OF A BANK DEPOSITOR IN THE BANK'S RECORDS OF HIS ACCOUNT

The Bank Secrecy Act of 1970,[22] which authorized the Secretary of the Treasury to prescribe by regulation certain record-keeping and reporting requirements for banks, did not create any proprietary or privacy interest of depositors in their bank accounts where none existed before. Under the Act each bank continues to pay for copying and storing its records, and the records remain the bank's property. Moreover, as this Court observed in *California Bankers Assn.* v. *Shultz, supra,* 416 U.S. at 48–49, the bank continues to be a party to all the transactions which it records. Hence, the mandatory record-keeping requirements of the Act do not transform the bank into a government agent. *Id.* at 52. "[I]n making the records required by the Secretary * * * [the bank] neither searches nor seizes records in which the depositor has a Fourth Amendment right." *Id.* at 54.

Indeed, the compulsory record-keeping provisions of the Act give depositors even less reason than before to expect that information conveyed in their bank transactions will be private. Just as this Court noted in *Couch* v. *United States, supra,* that "there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return" (409 U.S. at 335), so here there can be little expectation of privacy in those transac-

[22] See n. 8, *supra.*

tions with a bank for which it is required to maintain records because of Congress's determination that such records "have a high degree of usefulness in criminal, tax, or regulatory investigations * * *." 12 U.S.C. 1829b(a)(2).

It would be a gross anomaly if this Act, which was designed to insure the maintenance of bank records to aid law enforcement investigations, resulted in less governmental access to them than when the records were voluntarily maintained. Prior to enactment of the Bank Secrecy Act, it had been the practice of many banking institutions to photocopy their checks.[23] In the instant case, for example, prior to mandatory record-keeping, the Citizens and Southern National Bank, where respondent maintained an account, had microfilmed all checks presented at the bank for payment; other checks were microfilmed elsewhere (App. 38). But it was often difficult to retrieve copies of particular checks because checks were not microfilmed in any particular order, and few institutions microfilmed all checks (*ibid.;* see also H.R. Rep. No. 91–975,

[23] Since 1928 most banks have retained photocopies or microfilm of cancelled checks to insure against lost items or spurious claims. See Hearings on H.R. 15073 before the House Committee on Banking and Currency, 91st Cong., 1st and 2d Sess. 72–74, 320–321, 340 (1969–1970) (hereinafter "House Hearings"). Prior to the development of microfilming, however, the information contained in these documents was generally limited to dates and amounts of debits annd credits. Names of payees and endorsees were not usually recorded. See Chorley, *Law of Banking* 112–114 (4th ed. 1960); Fiske, *The Modern Banks* 79 (1904) (after clearinghouses developed, some banks would record additional information in a "transit" ledger on checks sent for collection); see also *United States* v. *First National Bank of Mobile*, 67 F. Supp. 616, 619 (S.D. Ala).

91st Cong., 2d Sess. 11 (1970)). In light of this difficulty, Congress promulgated the Bank Secrecy Act to assure uniform and systematic record-keeping and to "insure that domestic banks and financial institutions continued to maintain adequate records of their financial transactions with their customers" (*California Bankers Assn.* v. *Shultz, supra,* 416 U.S. at 26–27).[24]

In so doing, Congress clearly specified that the recordkeeping requirements should not alter the manner by which the government traditionally had obtained access to bank records when the banks maintained them voluntarily. It stressed that "existing legal process" should continue to govern such access (H.R. Rep. No. 91–975, *supra,* at 10; see also S. Rep. No. 91–1139, 91st Cong., 2d Sess. 5 (1970)).[25] Reiterat-

[24] See Hearings on S. 3814 and S. 3828 before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess. 41–60, 106–122 (1972) (hereinafter "Senate Hearings"); House Hearings 10–180.

[25] The Report of the House Committee on Banking and Currency stated (H.R. Rep. No. 91–975, 91st Cong., 2d Sess. 10):

"It should be borne in mind that records to be maintained pursuant to the regulations of the Secretary of the Treasury will not be made automatically available for law enforcement purposes. They can only be obtained through existing legal process."

The Senate Banking Committee's report stated (S. Rep. No. 91–1139, 91st Cong., 2d Sess. 5):

"Access by law enforcement officials to bank records required to be kept under this title would, of course, be only pursuant to a subpena or other lawful process as is presently the case. The legislation in no way authorizes unlimited fishing expeditions into a bank's records on the part of law enforcement officials."

See also Letter of Secretary of the Teasury George P. Shultz, June 19, 1972, in Senate Hearings at 292.

ing this stated intent, the regulations promulgated under the Act provide that inspection, review, or access to the records required by the Act to be maintained is governed by existing legal process. 31 C.F.R. 103.51; see *California Bankers Assn.* v. *Shultz, supra,* 416 U.S. at 34, n. 8. As we have indicated, under "existing legal process" (as it now exists and as it existed at the time the Bank Secrecy Act was enacted) a bank depositor is without standing to challenge under the Fourth Amendment a subpoena *duces tecum* directed at the bank for copies of its records of transactions in the depositor's account.[26]

[26] In *California Bankers Assn.* v. *Schultz, supra,* 416 U.S. at 52, the Court stated: "We see nothing in the Act which violates the Fourth Amendment rights of any of these plaintiffs. Neither the provisions of Title I [the record-keeping requirements] nor the implementing regulations require that any information contained in the records be disclosed to the Government; both the legislative history and the regulations make specific reference to the fact that access to the records is to be controlled by existing legal process."

The court of appeals in the instant case apparently interpreted this to mean that "existing legal process" for bank records protects Fourth Amendment interests of bank depositors, and that depositors therefore have standing to challenge the legality of such process (see Pet. App. A, pp. 14a–15a). But there is no basis in this Court's opinion in *California Bankers* for inferring such an unwarranted extension of the Fourth Amendment. Indeed, in the next ensuing paragraph of the *California Bankers* opinion the Court noted that it had "decided long ago that an Internal Revenue summons directed to a third-party bank was not a violation of the Fourth Amendment rights of either the bank *or the person under investigation by the taxing authorities*" (416 U.S. at 53; emphasis supplied) and quoted with approval Mr. Justice Douglas' concurring statement in *Donaldson* that "'[I]t is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress'" (*ibid.*).

II

A GRAND JURY SUBPOENA DUCES TECUM IS NOT DEFECTIVE, NOR DOES IT VIOLATE THE FOURTH AMENDMENT, (1) BECAUSE ISSUED BY THE DISTRICT COURT CLERK AND COMPLETED BY THE UNITED STATES ATTORNEY'S OFFICE ON BEHALF OF THE GRAND JURY, (2) BECAUSE THE GRAND JURY WAS NOT SITTING ON THE SUBPOENA'S RETURN DATE, OR (3) BECAUSE THE SUBPOENA SOUGHT PRODUCTION OF ALL RECORDS RELATING TO A NAMED DEPOSITOR FOR A PERIOD OF APPROXIMATELY FOUR MONTHS

Even if it were assumed *arguendo* that a depositor has standing to challenge a subponea *duces tecum* of bank records of his account, the court of appeals has radically (and, we submit, erroneously) departed from tradition and practice in holding that a grand jury subpoena is defective, and that the defects constitute an unreasonable search and seizure, when it is "issued not by the court or by the grand jury, but by the United States Attorney's office, for a date when no grand jury was in session, and which in effect compelled broad disclosure of * * * financial records to the government * * *" (Pet. App. A, pp. 14a–15a).

The two subpoenas in question here were issued in blank by the district court clerk, completed by the United States Attorney's office, and served by Treasury agents upon the presidents of the two banks where respondent maintained accounts. They required the bank presidents to appear in the United States District Court for the Middle District of Georgia at 9:00 a.m. on January 24, 1973, and to produce (App. 20, 22):

> all records of accounts, *i.e.*, savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date [January 22, 1973 in the case of one bank, and January 23, 1973 in the case of the other].

The grand jury did not meet until February 12, 1973, nineteen days after the earlier return date on the subpoenas.

As we shall now show, there was nothing "defective" about these subpoenas; their issuance conformed to "existing legal process" and accepted practice. The requirements inferentially imposed by the court of appeals would be impractical and time-consuming. In any event, the subpoenas, even if defective, did not constitute an unreasonable search or seizure.

A. THE SUBPOENAS WERE NOT DEFECTIVE

It is not clear from its opinion whether the court intended that any of the three noted "defects" would alone have sufficed to justify the result it reached, or whether its action depended upon the convergence of all three factors. In any event, we submit that none of the three factors consituted a "defect," and that the subpoenas *duces tecum* in the instant case—issued by the clerk of the court and completed by the United States Attorney's office on behalf of the grand jury, returnable 19 days before the grand jury was to meet, and calling for bank records of respondent's accounts during a four-month interval—was duly authorized in

accordance with "existing legal process." *California Bankers Assn.* v. *Shultz, supra,* 416 U.S. at 54, n. 24.

1. *A subpoena may be issued in blank by the district court clerk to any party requesting it.* The subpoenas *duces tecum* here were issued in accordance with Rule 17(a), Fed. R. Crim. P., which provides in pertinent part:

> A subpoena shall be issued by the *clerk* under the seal of the court * * *, signed and sealed but other wise *in blank* to a party requesting it * * * [Emphasis supplied.]

Moreover, it is generally accepted practice for such subpoenas to be "issued in the name of the district court over the signature of the clerk * * * pro forma and in blank to anyone requesting them." *In re Grand Jury Proceedings* (*Schofield I*), 486 F. 2d 85, 90 (C.A. 3); *In re Lopreato,* 511 F. 2d 1150, 1152 (C.A. 1).[27]

It is unclear precisely what the court of appeals would require in place of the procedure that was employed in the instant case, other than having the court or grand jury approve each subpoena prior to its being served. But either of these alternatives would be needless and impractical. The necessity of prior grand jury approval would substantially impede the effective functioning of the grand jury. The grand jury depends upon the presentation of relevant evi-

[27] See also *United States* v. *Morton Salt Co.,* 216 F. Supp. 250 (D. Minn.), affirmed *per curiam,* 382 U.S. 44; *United States* v. *Van Allen,* 28 F.R.D. 329 (S.D.N.Y.); *United States* v. *Culver,* 224 F. Supp. 419 (D. Md.); *In re Subpoenas Duces Tecum,* 248 Fed. 137 (E.D. Tenn.).

dence in an orderly manner—necessitating that the government attorney review the evidence prior to grand jury consideration, often before the grand jury is called into session.[28] For example, the practice in the Middle District of Georgia, according to the district court, is for the United States Attorney "to prepare for the calling of the grand jury and to prepare matters to be presented to it" (App. 46). A requirement that the grand jury itself issue the subpoena therefore would be unnecessarily time-consuming and (particularly in districts where the grand jury meets infrequently and its sessions are of brief duration) difficult to arrange. See *Martin* v. *Beto,* 397 F. 2d 741, 745 (C.A. 5), certiorari denied, 394 U.S. 906; *United States* v. *Kleen Laundry & Cleaners, Inc.,* 381 F. Supp. 519, 521 (E.D.N.Y.).

The alternative requirement, that the court approve each subpoena prior to issuance, would be cumbersome and wasteful of judicial resources. A subpoena, unlike a search warrant, is merely a request to produce documents or to testify. It does not constitute a self-enforcing governmental intrusion upon possession of property necessitating prior judicial scrutiny, since nothing is thereby taken from the subpoenaed party, who may obtain an order to quash the subpoena if production would be "unreasonable or oppressive" (Rule 17(c), Fed. R. Crim. P.) or contest the subpoena in a show cause hearing. *United States* v. *Ryan,* 402 U.S. 530; *Cobbledick* v. *United States,* 309 U.S.

[28] See, *e.g.*, *United States* v. *Johns-Manville Corp.,* 213 F. Supp. 65, 73–74, n. 20 (E.D. Pa.).

323.[29] Before passing upon an application for enforcement of a subpoena, a court in any event must afford the subpoenaed party an opportunity to present the defenses that may be available to him. See *Gelbard* v. *United States,* 408 U.S. 59–60; *In re Grand Jury Proceedings* (*Schofield I*), *supra,* 486 F. 2d at 88–92.

To be sure, the power to subpoena bank records without the necessity of obtaining prior judicial approval of each subpoena may on occasion be abused, as all power may be abused. The solution, however, is not to restrict that authority so as to undermine the efficacy of grand jury investigations. As this Court recently observed with regard to a similar potential for abuse in the issuance of Internal Revenue Service summonses, " '[t]hat the power may be abused, is no ground for denying its existence. It is a limited power, and should be kept within its proper bounds, and, when these are exceeded, a jurisdictional question is presented which is cognizable in the courts.' " *United States* v. *Bisceglia,* 420 U.S. 141, 151 (citations omitted).

2. *A subpoena duces tecum need not be returnable on a date when the grand jury is sitting.* The court of appeals' additional requirement that subpoenas *duces tecum* be returned on a date when the grand jury is sitting would seriously inconvenience grand juries that meet infrequently and in sessions of rela-

[29] See also *Oklahoma Press Publishing Company* v. *Walling,* 327 U.S. 186, 208–209; *United States* v. *Birrell,* 242 F. Supp. 191, 204 (S.D.N.Y.); *Application of Kelly,* 19 F.R.D. 269 (S.D.N.Y.).

tively brief duration. This requirement would sometimes necessitate that the grand jury be convened solely for the purpose of being in session when subpoenaed items are produced, notwithstanding that the government attorney who is conducting the grand jury's investigation will not present the items for its consideration until a later date.

This formality would serve no legitimate purpose. It would not protect against the possibility that subpoenas *duces tecum* might be used improperly by the government to further its own investigations rather than to aid the grand jury,[30] nor would it enhance the role of the court or grand jury in supervising the acquisition of evidence to be presented before it.

Nor, prior to the decision in the instant case, had any court imposed such a requirement.[31] To the con-

[30] A grand jury subpoena may not be used for the sole purpose of preparing a case for trial. See, *e.g.*, *United States* v. *Del Toro,* 513 F. 2d 656, 664 (C.A. 2); *Durbin* v. *United States,* 221 F. 2d 520, 522 (C.A.D.C.); *United States* v. *O'Connor,* 118 F. Supp. 248 (D. Mass.).

[31] While several courts have required, pursuant to Rule 17(a), Fed. R. Crim. P., that subpoenas *ad testificandum* be returned on a date when the grand jury is sitting (see, *e.g.*, *United States* v. *Hedge,* 462 F. 2d 220, 223 (C.A. 5); *United States* v. *Standard Oil Co.,* 316 F. 2d 884 (C.A. 7)), that requirement is inapplicable to subpoenas *duces tecum* issued pursuant to Rule 17(c). Rule 17(c), Fed. R. Crim. P., provides that "[t]he court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or *prior to the time when they are to be offered in evidence* and may upon their production permit [them] to be inspected by the parties and their attorneys" (emphasis supplied). It is unclear, however, whether such prior production requires a separate court order, or whether a duly issued subpoena is sufficient. See 8 Moore's *Federal Practice* ¶ 17.07 (2d ed., 1972); 1 Wright, *Federal Practice and Procedure: Criminal* § 272 at 550–551 (1969).

trary, in *United States* v. *Morton Salt Co., supra,* a government attorney had procured a subpoena *duces tecum* issued from the office of the clerk of the court and returnable 23 days before the grand jury was impaneled (216 F. Supp. at 252–253). The defendants contended that this procedure was improper. The court, finding this argument "patently unsound," noted that "[t]he right of government counsel to inspect documents before presenting them to the Grand Jury is well recognized and fairly comes within the purview of Rule 17(c)" (*id* at 257).

It is, in any event, difficult to see why the depositor should be heard to complain about the return dates of the subpoenas, when the banks, upon whom the burden of compliance fell, found those dates unobjectionable. See point I, *supra.*

3. *The subpoenas were sufficiently particularized.* The court of appeals also found the subpoenas to be defective because they "compelled broad disclosure of [respondent's] financial records to the government" (Pet. App. 15a). But the court did not specify what it was about the "broad disclosure" that made it improper; the fact that a subpoena compels "broad disclosure" is not itself determinative. To be sure, if broad disclosure is compelled because the subpoena is so indefinite that in order to comply the subpoenaed party must produce many unnecessary items, the subpoena may be deemed defective.[22] In the instant case,

[22] See, *e.g.*, *United States* v. *Olin Mathieson Chemical Corporation*, 36 F.R.D. 18 (S.D.N.Y.); *In re Subpoena Duces Tecum, Etc.*, 203 F. Supp. 575, 578 (S.D.N.Y.); *People* v. *Dorr*, 47 Ill. 2d 458, 265 N.E. 2d 601. Moreover, a subpoena may be deemed unreasonable if compliance would impose a disproportionate burden upon the subpoenaed party measured against the

however, the subpoenas specified with reasonable particularity the items sought to be produced. They identified respondent, his home and business addresses, and the precise dates at issue (October 1, 1972 to January 22 and January 23, 1973). Indeed, the subpoenas were in several respects more specific than the Internal Revenue Service "John Doe" summons to discover the identity of a person who had bank transactions suggesting possible liability for unpaid taxes, which was upheld in *United States* v. *Bisceglia, supra.*

The records sought were described with sufficient definiteness that the subpoenaed parties knew what was sought and were able to comply without undue difficulty. This alone is strong evidence of the adequacy of the description. *Brown* v. *United States,* 276 U.S. 134, 143.

B. EVEN IF DEFECTIVE, THE SUBPOENAS DID NOT CONSTITUTE AN UNREASONABLE SEARCH OR SEIZURE

1. The court of appeals assumed, again without analysis, that the deficiencies it perceived in the issuance of the subpoenas *duces tecum* amounted to a Fourth Amendment violation. Even if it is assumed that the subpoenas were defective in one or more of the respects stated by the court, however, that fact has no constitutionally significant bearing on the question whether the subpoenas constituted an unreasonable search or seizure. Since a subpoena *duces tecum* does not by itself authorize government officers to compel production of any items, there is no justification or precedent for creating a presumption of unconstitutionality when the subpoena does not conform to all technical requirements. The proper test to be applied

relevance and materiality of the items to the grand jury's inquiry. See pp. 46–47, *infra.*

is whether the subpoena, if enforced by the court, would result in an unreasonable search or seizure. By that standard, the subpoenas in the instant case were not unreasonable.

The reasonableness of an investigation for the purpose of eliciting evidence that may be helpful to the grand jury in determining whether a crime has been committed and, if so, by whom, is appropriately judged by a different standard from that governing a police search or seizure that is undertaken to gather evidence of a crime, since the two processes have significantly distinct effects and purposes. The differences this Court has noted between the impact of an arrest and of a subpoena *ad testificandum* are equally pertinent with respect to the differences between a police search or seizure and a subpoena *duces tecum* (*United States* v. *Dionisio,* 410 U.S. 1, 10):

> The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest [or police search and seizure] * * *. "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances * * *. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of the court." [Citation omitted.]

Moreover, it is irrelevant that the grand jury may have little or no probable cause to believe that the records it seeks will reveal incriminating information, since its function is essentially exploratory. "[T]he

Grand Jury * * * can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Bisceglia, supra,* 420 U.S. at 148, quoting from *United States* v. *Powell,* 379 U.S. 48, 57, and *United States* v. *Morton Salt Co.,* 338 U.S. 632, 642–643. Indeed, if its investigation is to be meaningful, "[s]ome exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury." *Schwimmer* v. *United States,* 232 F. 2d 855, 862–863 (C.A. 8). The grand jury's task is to determine whether probable cause exists; it could hardly be expected to perform that function if it were required to have probable cause before undertaking its investigation. *United States* v. *Weinberg,* 439 F. 2d 743, 749 (C.A. 9); *United States* v. *Doe,* 460 F. 2d 328, 332 (C.A. 1), certiorari denied *sub nom. Popkin* v. *United States,* 411 U.S. 909

Nor is it relevant that, in gathering its evidence, the grand jury may intrude upon a witness's expectations of privacy. Given the grand jury's special role in insuring fair and effective law enforcement, every citizen has a basic obligation to produce evidence that may be relevant to its inquiry, even if "his responses might prove embarrassing or result in an unwelcome disclosure of his personal affairs." *United States* v. *Calandra,* 414 U.S. 338, 353. "Ordinarily * * * a witness has no right of privacy before the grand jury. Absent some recognized privilege of confidentiality, every man owes his testimony." *Ibid.* See also *Branzburg* v. *Hayes,* 408 U.S. 665, 688; *United States* v. *Weinberg, supra; United States* v. *Doe, supra.*

The pertinent question for judging the reasonableness of a subpoena *duces tecum* is, rather, whether compliance would be unnecessarily difficult because inordinately time-consuming, expensive, or otherwise inconvenient, when measured against the relevance and materiality to the grand jury's inquiry of the items sought in the subpoena." As Judge Learned Hand observed in *McMann* v. *Securities and Exchange Commission, supra,* 87 F.2d at 379:

> No doubt a subpoena may be so onerous as to constitute an unreasonable search. * * * Even then, the sanction is unobjectionable, unlike a descent upon one's dwelling or the seizure of one's papers; the search is "unreasonable" only because it is out of proportion to the end sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds.

[33] See *Hale* v. *Henkel*, 201 U.S. 43, 76-77 ("Applying the test of reasonableness to the present case, we think the *subpoena duces tecum* is far too sweeping * * *. [I]t is difficult to say how [the company's] business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case * * *."); *Brown* v. *United States*, *supra*, 276 U.S. at 143 ("Having produced [the subpoenaed documents] once without difficulty and without undue interference with the affairs of the association, so far as appears, there is no reason why he should not produce them again * * *.") *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 213 ("[T]he only abuses from which protection [from an unreasonable subpoena *duces tecum*] rightfully may be claimed * * * [are that of] [o]fficious examination [which] can be expensive * * * [and] time-consuming, clogging the process of business.").

Accordingly, if the items sought by the grand jury are vital to its inquiry, the subpoena is likely to be deemed reasonable, notwithstanding that compliance is significantly burdensome. Yet the subpoena is also likely to be reasonable when the items sought are less crucial to the inquiry, but compliance imposes little or no burden upon the subpoenaed party.

It would therefore be unlikely that a subpoena *duces tecum* which directs a bank to produce its records of a depositor's account would violate the depositor's Fourth Amendment rights, even if it is assumed that the depositor has a protectable Fourth Amendment interest in the records, since the depositor bears none of the burden of producing them. In the instant case, the subpoenas directed two bank presidents to testify and bring with them "all records of accounts * * * in the name of Mr. Mitch Miller * * *" (App. 26, 30). The subpoenas imposed no burden upon respondent whatsoever; they did not require him to produce any items nor to take any action.[34]

Moreover, the records sought by the subpoenas were clearly relevant and material to the grand jury's inquiry. The court of appeals did not deny that, at the time the subpoenas were issued, there was substantial basis for the relief both that respondent was involved in the offense under investigation and that the banks' records of his account might contain important evidence of the illegal activities. On Decem-

[34] Indeed, the banks, upon whom the burden of compliance fell, did not claim that the burden was unreasonable. See pp. 48–51, *infra*.

ber 18, 1972, a van-type truck, occupied by respondent's alleged co-conspirators, was found to contain distillery apparatus; on January 19, 1973, a 7500-gallon distillery and 175 gallons of non-tax-paid whiskey were found at the warehouse, which was rented by respondent. The banks' records of respondent's account from October 1, 1972 to January 22 or 23, 1973, therefore were likely to contain highly relevant and material evidence. The records thus were sought in connection with a specific investigation which in fact resulted in an indictment by the grand jury. In these circumstances, even if technically defective, the subpoenas *duces tecum* did not constitute an unreasonable search or seizure; accordingly, even if respondent had a protectable Fourth Amendment interest in the records produced, that interest was not abridged.

2. In any event, even if it is assumed that the subpoenas were defective and that respondent had a protectable Fourth Amendment interest in the banks' records of his transactions with it, the banks' voluntary compliance with the subpoenas *duces tecum* seeking production of the records in itself satisfied the Fourth Amendment.

It is well established that a third party's voluntary consent may validate an otherwise unreasonable search of an object or area over which the third party has "common authority." *United States* v. *Matlock,* 415 U.S. 164; *Frazier* v. *Cupp,* 394 U.S. 731, 740; *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 245–246. In *United States* v. *Matlock, supra,* the Court defined "[c]ommon authority * * * which justifies the third-

party consent" as "mutual use of the property by persons generally having joint access or control for most purposes" (*id.* at 171, n. 7).[35] A bank manifestly exercises at least as much control over, and has at least as much access to, its records of a depositor's account as does the depositor himself. The bank therefore has authority to permit government access to such records, notwithstanding any protectable Fourth Amendment interest that its depositor may also have in them. Indeed, a depositor gives his bank such complete freedom of access to information contained on instruments which he deposits and which his payees present for payment that he in effect accepts the risk that the bank will consent to a governmental search. See *Frazier* v. *Cupp,* 394 U.S. 731, 740.

A bank officer's decision to comply with a subpoena *duces tecum* seeking access to its records is no less voluntary because the subpoena states that its recipient is "commanded" to produce such records. Unlike a search warrant, a subpoena *duces tecum* is not self-enforcing; it confers no authority on government agents to search or seize, and nothing may be taken from the subpoenaed party if he refuses to comply.

> The service of a subpoena is but the delivery of a paper to a party—is open and aboveboard. There is no element of trespass or force in it. It does not disturb the possession of property. It cannot be finally enforced except after challenge, and a judgment of the court upon the challenge [*Hale* v. *Henkel,* 201 U.S. 43, 80, McKenna, J., concurring].

[35] See Weinreb, *Generalities of the Fourth Amendment,* 42 U. Chi. L. Rev. 47, 54–64 (1975).

A subpoena *duces tecum* may be resisted by obtaining an order to quash it if production would be "unreasonable or oppressive" (Rule 17(c), Fed. R. Crim. P.; see also *United States* v. *Nixon, supra,* 418 U.S. at 697–699) or contesting the subpoena in a show cause hearing. See p. 39, *supra.* A bank officer's acquiescence is therefore unlike a consent to search given after police have stated that they possess a search warrant (see *Bumper* v. *North Carolina,* 391 U.S. 543). Indeed, his consent may be valid even in the unlikely event that he is unaware of the bank's right to refuse to comply with the subpoena *duces tecum. Schneckloth* v. *Bustamonte,* 412 U.S. 218, 234.

In the instant case, there is no reason to suppose that the banks' compliance was not entirely voluntary. The subpoenas were served on the presidents of the two banks where respondent had accounts. The two bank presidents can be presumed to be mature and intelligent persons who are reasonably knowledgeable about the bank's rights and obligations in such matters. Moreover, the subpoenas were served during business hours at the place of business where the records were required by law to be maintained. The record reveals nothing in the manner by which they were served that was likely to coerce or intimidate their recipients. See *Davis* v. *United States,* 328 U.S. 582, 593–594.

Bank records should not be excepted from the general rule that recognizes the validity of a third party consent to search. Such an exception would seriously impair the functioning of the grand jury, which is critically dependent upon its ability to obtain information in the hands of third parties about transactions under investigation in which they participated. This is particularly true with regard to banks, whose records of their transactions are often indispensable to a successful inquiry.

III

EVEN IF A FOURTH AMENDMENT VIOLATION WERE ASSUMED, A RETRIAL, WITH EXCLUSION OF THE EVIDENCE OBTAINED BY THE DEFECTIVE GRAND JURY SUBPOENAS, WOULD BE AN INAPPROPRIATE REMEDY

Even if this Court were to conclude, contrary to our contentions, that the subpoenas *duces tecum* were defective and violative of respondent's Fourth Amendment rights, it would not follow that the proper remedy would be "a new trial free from the taint of evidence improperly acquired" (Pet. App. A, p. 16a). A new trial would merely waste judicial resources, since the excluded bank records presumably could be reacquired pursuant to validly issued subpoenas, and the evidence derived therefrom reintroduced, under the "independent source" doctrine of *Wong Sun* v. *United States,* 371 U.S. 471, 488. Cf. *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385, 392.[38] The government's knowledge of the existence and location of the records of respondent's bank accounts was derived independently from the "seizure"

[38] The court of appeals did not address the question whether this evidence, even though held to have been improperly obtained in connection with the prior trial, could now be lawfully obtained through regular process acceptable in form to the court of appeals. If there is to be a new trial, considerations of judicial economy would appear to call for some consideration of this question at the present time.

effected under the original subpoenas. Indeed, at the time they were served, the government was fully aware that the Bank Secrecy Act required the banks to maintain the records, and that the records would be in their custody. See *United States* v. *Kleen Laundry and Cleaners, supra,* 381 F. Supp. at 524.

In any event, it is manifestly unnecessary to adopt an exclusionary rule to assure compliance with the proper procedures for issuing subpoenas *duces tecum.* Unlike circumstances where exclusion is deemed necessary as a means of correcting and forestalling certain forms of police behavior that violate Fourth Amendment rights, an exclusionary principle in this context would be addressed to regulation of the conduct of government attorneys, presumably to insure that they inform bank depositors whenever subpoenas *duces tecum* are directed at the banks with which they deal seeking records of their accounts, so that the depositors may challenge any improprieties. There is no reason, however, to suppose that government attorneys would disobey such a notice requirement. Accordingly, the drastic remedy of exclusion of relevant evidence in criminal cases is not warranted here.

Moreover, there is no reason to believe that any deficiency in the subpoenas *duces tecum* directed at the two banks here was deliberate. Nor was there any reason for the government attorney who was conducting the grand jury investigation to believe that the subpoenas were in any way defective or that he was required to notify respondent at the time the subpoenas were served. At that time, the courts had uniformly held that a bank depositor had no Fourth Amendment interest in the bank records of his account (see n. 16, *supra*). As this Court recently noted, "[t]he deterrent purpose of the exclusionary rule necessarily assumes * * * willful, or at the very leat negligent, conduct * * *. Where the official action was pursued in complete good faith, * * * the deterrence rationale loses much of its force." *Michigan* v. *Tucker,* 417 U.S. 433, 447.

Finally, we submit that exclusion is an inappropriate remedy for procedural irregularities that have no significant bearing upon substantial rights. Where, as here, there is no showing that the alleged defects significantly prejudiced respondent's Fourth Amendment rights (even if it is assumed that he had a protectable Fourth Amendment interest at stake), and there is every reason to believe that the subpoenas would have been enforced even had respondent been given an opportunity to challenge them, the violation was not of sufficient magnitude or consequence to justify use of the exclusionary rule. See, *e.g., United States* v. *Burke,* C.A. 2, No. 75–1021, decided May 15, 1975

(Friendly, J.) *United States* v. *Soriano*, 482 F. 2d 469, 478 (C.A. 5), modified on rehearing *en banc*, 497 F. 2d 147. Accordingly, suppression of the evidence derived from the allegedly defective subpoenas was at all events an inappropriate remedy in this case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court of appeals should be vacated and the case remanded to that court (see n. 9, *supra*).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1179

UNITED STATES OF AMERICA,

Petitioner,

v.

MITCHELL MILLER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

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UNITED STATES OF AMERICA,

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MITCHELL MILLER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF CASE

The Respondent does not substantially disagree with the basic Statement of the Case set forth by the government, but feels compelled to point out certain factual matters in the record which are relevant to issues presented herein.

One of the two subpoenas duces tecum served was served on the C & S of Warner Robins (formerly The

Bank of Warner Robins) and was not served on The Citizens and Southern National Bank. (App. 23-25, 34) The subpoenas in question were not requested by Treasurer agents, but were received by the ATF agent at the United States Attorney's office from a secretary. (App. 45) On the day of the hearing on the Respondent's Motion to Suppress, April 18, 1973, the ATF agent still had possession of the original copy of the subpoena and had filled in the information on the return. The agent also had possession of the checks and paperwork received from the banks. (App. 41)

An employee of the C & S Bank of Warner Robins testified that in August of 1972 the bank began microfilming all personal checks and that prior to that time, everything was not microfilmed. (App. 36) For example, checks received across the counter were microfilmed and some microfilming was done somewhere along the way in the collection process. (App. 38) In order to retrieve the Respondent's checks, she and the agents had to hunt through each roll of film for a day's work and look at other people's checks in addition to his in order to find the checks in question. (App. 36-37)

At the Bank of Byron, the ATF agent was allowed to sit in front of a Recordak machine and simply look through the checks and pick out the particular checks of interest. (App. 39-40)

I.

A BANK DEPOSITOR HAS A PROTECTABLE FOURTH AMENDMENT INTEREST IN BANK RECORDS OF HIS ACCOUNT AND REASONABLY EXPECTS INFORMATION THEREIN TO REMAIN PRIVATE.

The right to be secure in one's papers has been applied in a long and unbroken line of this Court's decisions to the compulsory production of one's books and records. See, e.g., *Boyd v. United States*, 116 U.S. 616 (1886) (court order to produce invoice), in which this court held that:

> . . . a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure. 116 U.S. at 622.

Accord: *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (subpoena duces tecum); *Oklahoma Press Publ. Co. v. Walling*, 327 U.S. 186, 214-16 (1946) (subpoena duces tecum); *United States v. Morton Salt Co.*, 338 U.S. 632, 651-52 (1950) (administrative order to report based upon statute); *See v. City of Seattle*, 387 U.S. 541, 545 (1967) (discussion of administrative subpoenas). See also *McMann v. Securities and Exchange Comm'n*, 87 F.2d 377, 379 (2d Cir. 1937) (L. Hand, J.).

What is sought to be protected here is one's bank accounts, "(f)or they mirror not only one's finances but his interest, his debts, his way of life, his family and his

civic commitments . . ." as well as ". . . a citizen's activities, opinion, and beliefs. . . ." *California Banker's Association v. Shultz*, 94 S.Ct. 1494, 1531 (1974)

The government is correct in recognizing in the ruling below the "notion" (Ptnr's Brief p. 18) that the government has circumvented the traditional Fourth Amendment protection accorded a person's private papers. In *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 a corporation's private papers were unlawfully acquired from its offices, copied by the District Attorney and later returned pursuant to a court order to the corporation. Thereafter, subpoenas to produce the originals were then served on the corporation for production of the originals which was refused. It was observed that "thus the case is not that of knowledge acquired the wrongful act of a stranger, but it must be assumed that the government planned and at all events ratified the whole performance." *Id.* at 391. The arguments of the government that it could avail itself of the knowledge obtained by the above means which otherwise it would not have had was soundly rejected. To do otherwise, would ". . . reduce the Fourth Amendment to a form of words". *Id.*

The interaction of the record keeping requirements of the Bank Secrecy Act, the purpose of which is acknowledged by the Petitioner to be expressly designed to insure that banks maintain adequate records that could be useful in criminal investigations (Ptnr's Brief p. 19, 33) plus the use of invalid grand jury subpoenas duces tecum to avoid the Fourth Amendment protection of private papers is evident here. It was noted in *California Banker's Association, supra.* at page 1501 that certain larger banks had abolished or limited the practice of photocopying checks, drafts and other

documents presented for payment in that Congress recognized that such records are not always automatically available for law enforcement purposes. In the case *sub judice*, The C & S Bank of Warner Robins never had microfilmed checks in the manner required by the act.

The Fourth Amendment is historically rooted in a concern for control over personal and private information in the face of governmental demands for access and use. See *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765); *Boyd, supra; Silverthorne, supra.* Here the admitted goal of the Bank Secrecy Act is the anticipatory recording and perpetuation of detailed financial information on bank depositor's accounts for *future* use against some bank depositors in possible criminal investigations.

The copies of checks and materials secured by illegal subpoena duces tecum herein were not made and maintained for the convenience and business purposes of the bank, but in fact of the civil and criminal compulsion of the Bank Secrecy Act. These copies should be accorded the same dignity as the original checks and materials returned to the depositor to insure the respondent's continuing right to privacy and right to be free of unreasonable searches and seizures under the Fourth Amendment. *Cf. Silverthorne, supra.* Indeed, ownership and possession of documents is not always dispositive when one's constitutional rights under the Fourth Amendment are at issue. In *Mancusi v. DeForte*, 392 U.S. 364 (1968), the Defendant was accorded standing to contest the seizure of certain union documents, from an office area shared by him, which did not belong to him after the service of a subpoena duces tecum on the local union.

It has also been recognized that the salutary rule of standing, which is a rule of practice must give way where there is a likelihood that there might be a denial of constitutional rights to individuals and in which it would be difficult if not impossible for the persons whose rights are asserted to preserve their rights. *Barrows v. Jackson*, 346 U.S. 294 (1952) See also *Pollard v. Roberts*, 283 F.Supp. 248 (E.P.D. Ark.), aff'd *per curiam*, 393 U.S. 14 (1968). It has recently been recognized that analysis of ownership, property rights and possessory interests in the determination of Fourth Amendment rights has been severely impeached by recent cases. *Katz, supra.*

It is submitted that "(o)ur problem, in terms of the principles announced in *Katz* is what expectations of pricacy [sic] are constitutionally 'justifiable'—what expectations the Fourth Amendment will protect in the absence of a warranty". *United States v. White*, 401 U.S. 745, 752 (1971). It is argued here that bank customers have a constitutionally justifiable expectation of privacy in the documentary details of the financial transactions reflected by their bank accounts.

It is hornbook law[1] that bank customers may expect their banks to treat their financial affairs as confidential. "The right of privacy and the right to keep

[1] . . . it is an implied term of the contract between the banker and his customer that the banker will not divulge to third persons without the consent of the customer, express or implied, either the state of the customer's account or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by court order, the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it. 10 Am. Jur. 2d, *Banks* 3332.

confidential one's financial affairs is well recognized." *Hecht v. Pro-Football, Inc.* 46 F.R.D. 605, 607 (D.D.C. 1969). In perhaps the leading case, the California Supreme Court struck down as a violation of the constitutional right to privacy a statute requiring the disclosure by public officials of financial interest exceeding $10,000. *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259 (1970).

Violation of that privacy by a bank has frequently been held to create a cause of action in contract. See e.g. *Milohnich v. First National Bank*, 224 So.2d 759 (Fla. Ct. App. 1969), and authorities cited; *Sparks v. Union Trust Co.*, 256 N.C. 478, 124 S.E.2d 365 (1962), *Peterson v. Idaho First National Bank*, 83 Idaho 578, 367 P.2d 284 (1961).

Even as between private parties, the public allegation of debt arising out of private financial transactions has been traditionally held to invade privacy, whether true or false. See, e.g. *Trammel v. Citizens News Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941); *Biederman's of Springfield v. Wright*, 322 S.W.2d 892 (Mo. 1959), and cases cited.

Brex v. Smith, 104 N.J. Eq. 286, 146 A. 34 (1929), is particularly relevant here. In *Brex* the court enjoined a prosecutor from obtaining the bank records of all the city's policemen, holding that the depositors had a "property interest" in the information in their accounts and that the bank had "an implied obligation . . . to keep these [accounts] from scrutiny until compelled by a court of competent jurisdiction to do otherwise," See also *United States v. First National Bank of Mobile*, 67 F.Supp. 616 (S.D. Ala. 1946); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

The Supreme Court of California has recently ruled that under Article 1, Sec. 13 of the California Constitution[2] that bank depositors have a constitutionally protected right against intrusions into the records of their banks. *Burrows v. Superior Court of San Bernadino County*, 529 P.2d 590 (1975). The court relied on this court's ruling in *Katz v. United States, supra.*

In regards to the rights to be protected, the court said

> "For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entire violitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affaris, opinions, habits, and associations. Indeed, the totality of bank records provides a virtual current biography. While we are concerned in the present case only with bank statements, the logical extension of the contention that the bank's ownership of records permits free access to them by any police officer extends far beyond such statements to checks, savings bonds, loan applications, loan guarantees, and all papers which the customer has supplied to the bank to facilitate the conduct of his financial affairs upon the reasonable assumption that the information would remain confidential." *Burrows, supra* at 596.

Similarily, the Pennsylvania courts have held that a subpoena upon banks for records of depositors is a

[2] "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated. . . ."

search and seizure under the Fourth Amendment and the depositor had a right to intervene in court and challenge the subpoena. See *Annenberg v. Roberts,* 333 Pa. 203, 2 A.2d 612 (1938).

The *Burrows* court recognized that the depositor makes disclosures regarding his financial records and accounts to the bank for the limited purpose of facilitating the conduct of his financial affairs, not for the purpose of broadcasting publicly his financial background, the status of us his accounts or any other information regarding his affairs with the bank. Indeed, perfect and absolute privacy is not required in the determination and evaluation of the existence of a reasonable expectation of privacy as was the case in *Mancusi v. DeForte, supra.* The fact that DeForte shared an office with other union officers was not dispositive in upholding his Fourth Amendment rights as ". . . DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office and that the records would not be touched except with their permission or that of Union higher-ups." *Mancusi v. DeForte, supra,* at 367. In *California's Bankers Association v. Shultz,* it was recognized that "financial transactions can reveal much about a person's activities, associations and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy." *California Banker's Association,* 94 Sup. Ct. 1494, 1526 (concurring opinions of Justices Powell and Blackburn).

Finally, the petitioner argues that the Bank Secrecy Act did not create any protectable interest in behalf of depositors and that banks are not an agent of the government. The argument loses sight of the fact that

many banks are unwilling participants as well as other banks who had never recorded microfilm copies of depositor's checks as the case here.

It has long been recognized that if a private person for his own purpose acquires evidence from another, rightfully or wrongfully, finds and reports contraband that no violation of the person's Fourth Amendment rights has occurred. See, e.g. *Burdeau v. McDowell*, 256 U.S. 465 (1921). But if a federal official or government agent "had a hand" in the acquisition of the information, even by making a request that could be refused, it is sufficient governmental action to find a violation of one's Fourth Amendment rights. *Lustig v. U.S.*, 338 U.S. 74, 78 (1941); *Silverthorne, supra.* Thus, incursions made by private parties at governmental request are governmental incursions regardless of whether or not the private party could rightfully have done so in the absence of governmental request or influence. See, e.g. *Corngold v. United States*, 367 F.2d 1 9th Cir. 66, where an airline employee who searched luggage at police request was held an agent of the government in so doing, notwithstanding the fact that the contract of carriage reserved to the airline the right of inspection. See also *Stoner v. California*, 376 U.S. 483 (1964); *United States v. Jeffers*, 342 U.S. 48 (1951); *Byars v. United States*, 273 U.S. 28 (1927).

In *United States v. United Mine Workers*, 330 U.S. 258, 284-288 (1947), coalmine workers were found to be "employees" of the government within the meaning of an exception of the anti-injunction rule of the Norris La Guardia Act where the government had seized the coalmines pursuant to the War Labor Disputes Act and had required the miners to work without striking or facing civil and criminal sanctions.

This court has found it necessary to delineate between governmental and private action and in many cases, governmental involvement far less than outright coercion under civil and criminal penalties has been held sufficient to make constitutional guarantees applicable to nominal "private" behavior. In *Adickes v. Kress & Co.*, 398 U.S. 144 (1970) Mr. Justice Harland said for the court that ". . . settled practice of state officials may be opposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements." Ids. *Id.* at 168. See e.g. *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Here civil and criminal compulsion permeates the acquisition of documents which would not have otherwise been reproduced and retained or available for subpoena.

The result in the case *sub judice* is an acquisition of otherwise private documents without warrant, judicial supervision or notice and is wholly unreasonable in scope and ignores the basic probable cause requirements of the Fourth Amendment of the Constitution of the United States.

II.

THE GRAND JURY SUBPOENAS DUCES TECUM VIOLATED THE RESPONDENT'S FOURTH AMENDMENT RIGHT AND THEIR ISSUANCE AND USE CONSTITUTED AN ABUSE OF PROCESS.

The respondent would initially request that attention be given to the fact that the record does not demonstrate that the subpoenas in question were issued in blank by the District Court, but that this is merely a presumption on the part of the petitioner. Inspection of the subpoenas in question will show that they bear no more than a rubber stamp facsimile signature of the clerk and presumably they were completed in the United States Attorney's office. The agent testified that he secured the subpoenas in question from a secretary in the office and served them on the bank presidents in question. No notice of the service of the subpoenas was given to the respondent and four months later on the date of the hearing of the Motion to Supress, copies of the subpoenas, without the return completed as well as the material secured from the banks was still in the hands of the ATF agent.

A subpoena duces tecum which is too sweeping may violate the Fourth Amendment. (*Hale v. Henkel*, 201 U.S. 43 (1906); *Boyd, supra*. Further, subpoenas duces tecum cannot be used by the government to give color to an otherwise illegal search and seizure. *Silverthorne Lumber Company, supra; Wallace and Tiernan Company, supra.*

Here the procuring of subpoenas issued in blank and apparently completed in the United States Attorney's office on which no return was made to the grand jury

or to the court prior to the time of the hearing on the Motion to Supress as well as the retention by the agent of the microfilm copies of the respondent's records is a clear and patent avoidance of judicial scrutiny. As was said in *United States v. United States District Court*, 407 U.S. 297 (1973)

> "The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsiblity are to enforce the laws, to investigate, and to prosecute. . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech" *Id.*, at 317, 92 S.Ct., at 2136.

The petitioner contends that the necessity for approval of the subpoenas duces tecum by the grand jury, the courts or return of material secured by them would inconvenience the grand jury process. Here it is graphically demonstrated that one must presume that the agent and the United States Attorney's office is about the grand jury's work and that the potential for abuse of judicial process is substantial in this instance and in view of the existence of the bank secrecy act.

The legal process employed here is patently inadequate to protect the right of privacy of individual depositors as the banks themselves cannot be relied upon to assert the rights of their depositors with sufficient force or to notify them so that they may take steps to protect their own interest. The respondent

was never notified of the acquisition of the microfilmed copies of checks and bank records. It has also been recognized that banks have regularly afforded governmental agents informal access to customer's records without notifying the customer. See *California Banker's Association, supra,* 94 S.Ct. at 1534-1535 (Marshall, J. dissenting) See also *Bailin, Banks Ordinarily Cooperate with IRS on Tax Examination of Customers.* 14 J. Tax 220 (1961); 118 Cong. Rec. 10828-33 (Daily Ed. June 30, 1972) (remarks of Senator Tunney reporting results of survey conducted by ACLU). Further, there is obvious incentive on the part of banks to cooperate with the government rather than litigate to protect private interests of the customers in view of the substantial regulations applicable to the banking industry.

Nor should it be assumed that a bank can reasonably consent to the production of records and otherwise private papers and documents placed in their hands for their limited and confidential use when the recording and retention of the records otherwise returned to the depositor is compelled under the bank's secrecy act. Rather, there is a strong presumption that the owner or custodian of property may not consent to a search on behalf of a person with a protectable interest in the property. See, e.g. *Stoner v. California,* 376 U.S. 483 (1964); *Corngold, supra, Mancusi v. DeForte, supra.* Such consent must be proven by the government including proof that the depositor gave the bank complete and unrestricted freedom over his financial information or that he implicitly authorized another to consent to an invasion of his privacy. *Bumper v. North Carolina,* 391 U.S. 543 (1968); *Corngold, supra.* at 7.

Here the bank's compliance purported legal process without notice to the depositor effectively nullifies judicial review and is contrary to the rule that the reasonableness of a search should be determined by weighing the competing interest by a neutral magistrate. *United States v. United States District Court, supra;* Cf. *California Banker's Association v. Shultz,* 416 U.S. at 78 (Powell and Blackmon, JJ., concurring), 79 (Douglas, Brannon and Marshall, JJ. dissenting).

For these reasons, it is respectfully argued that the subpoena duces tecum issued, used and retained by agents and the United States Attorney's office constitutes an abuse of process amounting to nothing more than process for the prosecution and that the ruling of the court below is correct and should be affirmed.

III.

CONSIDERATIONS OF JUDICIARY INTEGRITY AS WELL AS DETERRENCE OF ILLEGAL INVASIONS OF PRIVACY AND ABUSE OF JUDICIAL PROCESS REQUIRE A RETRIAL OF RESPONDENT'S CASE.

Rejection of illegally seized and tainted evidence and a re-trial is demanded to insure judiciary integrity and protection of the people against unauthorized invasions of privacy. The petitioner presumes the existence of an independent source of the evidence and investigative leads acquired through the subpoenas in issue, but the record demonstrates no such independent basis for, it could not have been known whether any of the checks in question could be used as evidence of crime until after they had been acquired. The agents and the U.S.

Attorney's office had to acquire the copies of the checks and documents in question before they could determine their relevancy to the alleged investigation in question.

In *Terry v. Ohio* 392 U.S. 1 (1968) it was recognized that the exclusionary rule serves the imperative of judiciary integrity and that the rule is calculated to prevent rather than repair. "Its purpose is to deter–to compel respect for the constitutional guarantee in the only effectively available way – by removing the incentive to disregard it." *Id.* at 12-13.

The substantial personal right to privacy in one's papers and effects cannot in any way be more effectively protected than by the suppression of evidence derived from this unauthorized use of process and invasions of privacy.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals be affirmed and the Respondent have the re-trial as ordered.

Respectfully submitted,

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